Department of Justice Canada
Ministère de la Justice Canada

Legislative Background: *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts* (Bill C-75)

MAY 2018

Canada

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INTRODUCTION

Delays in the criminal justice system significantly impact all those involved, in particular accused persons, victims of crime and those who are expected to be called as witnesses. Accused persons have the right to be tried within a reasonable time under section 11(b) of the *Canadian Charter of Rights and Freedoms (Charter)*, the failing of which can result in a stay of proceedings. These protections act as an important safeguard by limiting the amount of time an accused can be subject to restrictions on their liberty prior to a decision on their guilt or innocence. Despite that they are presumed innocent, accused persons are often subject to strict bail conditions or detained in remand centres while awaiting trial, with significant repercussions on their health and well-being, their family and social relationships, and their livelihood.

Lengthy criminal trials also impact negatively upon victims. Stays of proceedings due to delays compound victimization leading to feelings of "justice being denied." This erodes public confidence in the criminal justice system at large. Police, counsel, judges and other criminal justice professionals must continually re-align resources to reduce delays and their impact on accused and victims to ensure a fair and accessible justice system. These challenges are particularly acute for Indigenous persons and marginalized persons, such as those suffering from mental health or addiction issues, who are overrepresented in the criminal justice system.

BACKGROUND

In recent years, the issue of delays in the criminal justice system has been the subject of significant and sustained attention, including calls for action by provinces and territories, Parliament, key stakeholders, the media, as well as the general public. The Supreme Court of Canada's (SCC) decision in *Jordan* (2016) established a new framework for determining unreasonable delay, and in *Cody* (2017), the Court re-emphasized the responsibility of all criminal justice system participants, including judges, prosecutors and defence counsel, to move cases forward without delay, thus resulting in intensified pressure to reduce criminal justice system delays. Since these decisions, numerous cases have been stayed for unreasonable delay, some of which involved charges for serious offences (e.g., murder, serious assault). Federal, Provincial and Territorial (FPT) Ministers Responsible for Justice met in April and in September 2017 to discuss and identify key areas for legislative reform. The Standing Senate Committee on Legal and Constitutional Affairs released their final report in June 2017, which addressed a broad range of matters relating to criminal justice system delays, and the responsibility of all actors involved, to which the Government tabled its response letter in November 2017. These events have underscored the need for criminal justice system efficiencies, simplification and modernization.

Key Litigation

R v Jordan[1]

Barrett Richard Jordan was arrested in December 2008 and charged with various offences relating to drug possession and trafficking. In May 2011, Mr. Jordan was committed to stand trial, which lasted from September 2012 to February 2013. The total delay between the charges and the conclusion of the trial was 49.5 months, of which 5.5 were attributed to the accused. Mr. Jordan brought an application under section 11(b) of the *Charter* (right to be "tried within a reasonable time"), seeking a stay of proceedings due to this delay.

On July 8, 2016, in *R* v *Jordan*, the majority of the SCC (5-4) revised the analysis for unreasonable delay first established in *R* v *Morin* (1992). In *Jordan*, the SCC set out presumptive numerical ceilings on the time it should take to bring an accused person to trial: 18 months for cases proceeding to trial in provincial court, and 30 months in superior court (or in provincial court with a preliminary inquiry). If the presumptive ceilings are exceeded, the delay is presumed to be unreasonable and a stay of proceedings will follow unless the Crown establishes the presence of "exceptional circumstances," (i.e., discrete events beyond the control of the Crown that are unforeseeable and cannot be remedied, including the inherent complexity of a case). If the Crown is unable to establish "exceptional circumstances," the delay will be deemed unreasonable and a stay of proceedings will be entered.

In its decision, the Court stated that "a culture of complacency towards delay has emerged in the criminal justice system,"[2] and held that presumptive ceilings were necessary to "give meaningful direction to the state on its constitutional obligations and to those who play an important role in ensuring that the trial concludes within a reasonable time,"[3] to "enhance analytical simplicity" and to "foster constructive incentives."[4] The Court allowed a contextual application of the new framework for cases currently in the system to avoid a post-Askov[5] situation where thousands of charges were stayed due to the abrupt change in the law.[6] The Court found that a 49.5 month delay between the laying of the charges for drug possession and trafficking and Mr. Jordan's trial in a British Columbia Superior Court was unreasonable and contrary to section 11(b) of the *Charter*. It set aside the accused's convictions, and directed a stay of proceedings.

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[1] [2016] 1 S.C.R. 631
[2] *Ibid* at para 40.
[3] *Ibid* at para 50.
[4] *Ibid* at para 51.
[5] In *R v Askov* (1990), the SCC first established the criteria for a section 11(b) violation by setting our four factors to consider when determining if the delay is unreasonable: (1) length of the delay, (2) reason for the delay, (3) waiver of time periods and (4) prejudice to the accused.
[6] The SCC revisited the test set out in *R v Askov* in *R v Morin* (1992) by putting an emphasis on the presence or absence of prejudice and on the accused needing to prove that prejudice occurred.

R v Williamson[7]

Kenneth Williamson was charged in January 2009 with historical sexual offences against a minor. His trial was completed on December 20, 2011. The total delay between the charges and the conclusion of the trial in the Ontario Superior Court was 35.5 months, of which 1.5 months was attributed to the accused. Mr. Williamson brought an application under section 11(b) of the *Charter*, seeking a stay of proceedings due to this delay.

On July 8, 2016, the majority of the SCC (5-4) applied the new Jordan framework to this case. It found that the net delay of 34 months infringed the accused's right to be tried within a reasonable time. The majority also found the delay unreasonable under the transitional exceptional circumstances assessment.

In its decision, the Court stated that "the previous state of the law cannot justify the nearly three years it took to bring Mr. Williamson to trial on relatively straightforward charges."[8] However, the Court concurred with the Court of Appeal with regards to the seriousness of the crimes committed, and reiterated the Court of Appeal's statement that "the balance weighs in favour of [his] interests in a trial within a reasonable time, over the society interest in a trial on the merits."[9]

R v Cody[10]

James Cody was charged with drug trafficking and weapons offences on January 12, 2010. His trial was scheduled to conclude on January 30, 2015. Before the commencement of his trial, Mr. Cody brought an application under section 11(b) of the *Charter*, seeking a stay of proceedings due to the delay. Because the application pre-dated the release of *Jordan*, the trial judge applied the framework set out by the SCC in *Morin*, granted the application and stayed the proceedings. A majority of the Court of Appeal of Newfoundland and Labrador applied the *Jordan* framework and allowed the appeal, set aside the stay of proceedings and remitted the matter for trial.

On June 16, 2017, in a unanimous (7-0) decision, the SCC applied the *Jordan* framework and concluded that the net delay of 36.5 months in this case was unreasonable (60 months and 21 days elapsed between the time the charges were laid and the anticipated end of the appellant's trial). This decision was the SCC's first opportunity to consider the application of its *Jordan* test in a subsequent case. In making its decision, the Court clarified certain aspects:

(a) Defence delay is not only confined to frivolous applications;
(b) Trial judges must screen out applications that have no reasonable prospect of success;

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[7] 2016 SCC 28
[8] *Ibid* at paragraph 30.
[9] *Ibid* at paragraph 68.
[10] 2017 SCC 31

(c) Case complexity should be assessed as a whole, as opposed to by looking at particular aspects (e.g., voluminous disclosure); and,

(d) Transitional exceptional circumstances: the Crown will rarely, if ever, be successful in justifying the delay as transitional if it would have failed under the previous *Morin* test.

The Court went on to note that trial judges should also be proactive in intervening to increase efficiency, by encouraging the use of documentary evidence where reasonable or by refusing an adjournment request if it would result in unacceptably long delay.

R v Picard[11]

Adam Picard was arrested in December 2012 and charged with first degree murder. In March 2015, Mr. Picard was committed to stand trial, which was scheduled to conclude in December 2016. A total of 48 months elapsed between the time the charges were laid and the anticipated end of the appellant's trial, of which 2 months were attributed to the accused. The Crowns assigned to the case were not available for the trial until seven months after the first dates when both the Court and the defence were available. The Crown stated that it could not re-assign the case to other Crowns due to the complexity of the case and the amount of time the assigned Crowns had spent reviewing the complex evidence.

The *Picard* case was the first of a number of trial decisions dismissing murder charges for having violated the rights of an accused to be tried within a reasonable time under section 11(b) of the *Charter*, following the *R v Jordan* decision, to reach a provincial appeal court. The trial judge found the delay not justified and that transitional exceptional circumstances under *Jordan* did not apply.

In a unanimous decision, the Court of Appeal agreed with the trial judge that the complexity of the case did not justify the delay beyond the 30 month ceiling under the *Jordan* framework: however, it found that the transitional exceptional circumstances applied, since the facts of the case would not have led to a stay under *Morin*. Since the delay had occurred prior to the release of *Jordan*, the Court considered whether the case was subject to a transitional exceptional circumstance, including whether the delay could be justified by the Crown's reliance on the law as it previously stood. The Court acknowledged that "this case exhibits some of the delay concerns that *Jordan* sought to address ... the overall time needed to bring the case to trial combined with the Crown's refusal to agree to a trial on the first available dates in Superior Court", which would have resulted in a stay had the case occurred after *Jordan* had been released. It reiterated *Jordan's* dicta that parties' behaviour should not be "judged strictly, against a standard of which they had no notice."

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[11] 2016 ONSC 7061

Provincial/Territorial Perspectives

The criminal justice system is a shared responsibility between FPT governments. The federal government is responsible for the enactment of criminal law and procedure, criminal prosecutions of all federal offences (other than the *Criminal Code*), certain specified offences in the *Criminal Code* and prosecution of all offences in the territories, as well as the appointment of judges for superior courts. Provincial and territorial governments are responsible for the administration of justice, including the prosecution of criminal offences in the provinces, the administration of police, Crown and court personnel and the appointment of provincial court judges.

At their meetings held in April and in September 2017, FPT Ministers Responsible for Justice met to discuss actions taken and ways to strategically address delays in the criminal justice system. Discussions included identifying innovative and best practices as well as legislative reforms to resolve criminal cases in a just and timely manner. Agreement was reached on the need for targeted criminal law reform in six key priority areas: bail, administration of justice offences, preliminary inquiries, reclassification of offences, judicial case management, and mandatory minimum penalties. Ministers agreed on the importance of a collaborative approach with all players in the criminal justice system. Ministers also considered: policies, programs and resources; and alternatives to the traditional criminal justice system (including restorative justice).

Standing Senate Committee on Legal and Constitutional Affairs

On June 14, 2017, the Standing Senate Committee on Legal and Constitutional Affairs (Senate Committee) released its Nineteenth Report entitled, *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada* (Final Report).[12] Between February 3, 2016, and March 9, 2017, the Committee heard testimony from 138 witnesses, received dozens of written submissions, travelled to Vancouver, Calgary, Saskatoon, Montreal and Halifax to learn about local best practices and held over 35 meetings to study the issue. Submissions and testimony came from a range of key criminal justice system stakeholders, including: FPT elected and non-elected officials; former and sitting judges; representatives from Canadian and provincial/territorial associations of police, Crown counsel, criminal defense lawyers, and probation officers; legal aid organizations; and, advocacy organizations for victims of crime, Indigenous persons, children, incarcerated offenders, and individuals with mental health and/or addictions challenges. All persons consulted agreed broadly that delay in the criminal justice system is a significant problem, but they placed differing emphasis on its causes and potential solutions.

The Committee's Final Report contains 50 recommendations, 13 of which are identified as priorities, (e.g., alternatives to stays for serious indictable offences; judicial appointments; and expedited implementation of the Truth and Reconciliation Report). They address a broad range of criminal law

[12] **Report can be downloaded at :**
https://sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_e.pdf

issues and include calls for criminal law reform, judicial appointments, changes related to provincial and territorial governments and responsibilities and federal government initiatives to address delays in the criminal justice system. The Government tabled its response to the Senate Report on November 15, 2017, which sets out a multi-pronged federal strategy, including programming, legislation, and operational improvements, to address efficiencies in the justice system and reduce delays (Annex B).

Steering Committee on Justice Efficiencies and Access to the Justice System

In 2003, FPT Ministers responsible for Justice and the judiciary agreed that some of the major participants in the justice system should work together to recommend solutions to problems relating to the efficient and effective operation of the system, without compromising its fundamental values. Solutions may include the implementation of best practices as well as legislative amendments. The Steering Committee on Justice Efficiencies and Access to the Justice System (Steering Committee) was specifically created to examine issues related to justice efficiencies and access to the criminal justice system that are systemic and national and that may affect the justice system in a significant manner.

Members of the Steering Committee include six federal and provincial deputy ministers responsible for Justice, three representatives from the Canadian Judicial Council, three representatives from the Canadian Council of Chief Judges, one representative from the Canadian Bar Association, one representative from the Barreau du Québec, one representative from the Canadian Council of Criminal Defence Lawyers, and two representatives from the police community for a total of seventeen members.

To date, ten of the Steering Committee's reports have been publicly released:

- Report on Mega-trials (January 2005)
- Report on the Management of Cases Going to Trial (October 2005)
- Report on Early Case Consideration (October 2006)
- Report on Jury Reform (May 2009)
- Report on Self-Represented Accused (October 2010)
- Report on Disclosure in Criminal Cases (January 2012)
- Report on the Use of Technology in the Criminal Justice System (October 2012)
- Report on Proportionality (October 2012)
- Model Guidelines on Judicial Case Management in the Criminal Justice System (October 2016)
- Report on Bail (October 2016)

These reports were submitted to FPT Deputy Ministers and Ministers for their consideration. They are public reports and will soon be available on the internet.

Overview of challenges facing the criminal justice system

Canada's criminal justice system faces numerous major and multifaceted challenges. While the volume and severity of crime have decreased over the years, criminal court cases are becoming more complex and trials are taking longer to complete.

Crime severity decreasing: Statistics Canada reported that between 2006 and 2016, the Crime Severity Index, which measures the volume and severity of police-reported crime in Canada, has declined 29% for adults and 40% for youth.[13]

Longer trials: As criminal court cases are becoming more complex, criminal procedures influence trial duration and cases are taking longer to complete. Statistics Canada reported that the national median case completion time for charges heard in provincial courts was 126 days in 2015/2016: Quebec (228 days), Newfoundland and Labrador (171 days), Nova Scotia (170 days), and Manitoba (145 days) reported median case completion time greater than the national median.[14] It has also been noted that multiple charge cases (62% of all cases in adult criminal courts) take longer to complete compared to single-charge cases (154 versus 92 days). In addition, median time to case completion varies by the most serious offence in the case: from 19 days for unlawfully at large offences to 325 days for sexual offences such as sexual interference, invitation to sexual touching, luring a child via a computer and sexual exploitation to 469 days for homicide.

Remand issue: Remand, also called pre-trial detention, refers to the temporary detention of accused persons in provincial/territorial custody prior to trial or sentencing. The *Criminal Code* specifies conditions under which an individual can be detained in remand, such as to ensure attendance to court, protect the public, including victims and witnesses, and maintain public confidence in the justice system. Likewise, the Preamble of the *YCJA* 2002 indicates that the youth justice system should *reserve its most serious intervention for the most serious crimes and reduce the over-reliance on incarceration for non-violent young persons*, and that remand should be limited to particular grounds such as a serious offence charge, a likelihood that youth will not appear in court when required, or for the protection or safety of the public.

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[13] Keighley, K. (2017). *Police-reported crime statistics in Canada, 2016*. Statistics Canada, Catalogue no. 85-002-X.
[14] Maxwell, A. (2017). *Adult criminal court statistics in Canada, 2015/2016*. Statistics Canada, Catalogue no. 85-002-X. Superior Court data is not available from PEI, Ontario, Manitoba and Saskatchewan.

There are more people in provincial detention facilities awaiting trial than there are individuals found guilty of criminal offences and serving their sentence. Statistics Canada reported in 2015/16, that adults in remand accounted for 60% (N = 14,899) of the custodial population while those in sentenced custody made up 40% (N = 10,091) of the custodial population in provincial and territorial facilities.[15] More than half (51%) of individuals were held in remand for one week or less and more than three-quarters (76%) were held in remand for one month or less. The remand population is up from 26% in 1990/91[16,17], and remand admissions have consistently surpassed sentenced admissions since 2004/2005.[18] Similarly, in 2015/16, more than half (58%) of youth in custody were in pre-trial detention, up from 23% in 1997/98.[19,20]

In addition, remand represents a significant cost to the criminal justice system. A study (2014) found that in Ontario, the average cost to incarcerate a person in jail is $183 a day, which does not include the additional costs of court services, duty counsel, Crown counsel and judicial resources, and transporting the accused between the remand facility and court (often multiple times). This daily cost is significantly higher than the $5/day it costs to supervise an accused in the community.[21]

Administration of justice offences (AOJOs): Canadian criminal courts process a high number of AOJOs, such as breach of bail and probation conditions, and this volume is bringing increased pressure on the system. A recent Statistics Canada publication on AOJOs[22] reported that in 2013/2014, 39% of all cases[23] in adult criminal courts included at least one AOJO. Guilty verdicts were the most common outcome in these cases and cases that included at least one AOJO were more often resulting in a guilty verdict than cases without an AOJO (76% versus 55%). As well, the current approach to these breaches perpetuates individual cycles of incarceration and takes resources away from other cases, including those involving serious offences. For instance, custody was the most common sentence handed down in completed adult criminal court cases involving AOJOs (53% compared to 22% of completed cases that did not include an AOJO). The numbers in the youth criminal justice system are also high: in 2014/15,

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[15] Statistics Canada, Table 251-0005 *Adult correctional services, average counts of adults in provincial and territorial programs, annual*, CANSIM. (Accessed: January 10, 2018). Analysis of data excludes "other temporary detention" such as immigration hold, material witness and police lock-up, which accounted for 3% of those in custody in 2015/2016.

[16] This is the earliest year in which data were available.

[17] Statistics Canada, Table 251-0005 *Adult correctional services, average counts of offenders in provincial and territorial programs, annual*, CANSIM. (Accessed: January 10, 2018).

[18] Correctional Service Program, Statistics Canada. (2017). *Trends in the use of remand in Canada, 2004/2005 to 2014/2015*, Catalogue no. 85-002-X.

[19] This is the earliest year in which data were available.

[20] Statistics Canada, Table 251-0008 *Youth correctional services, average counts of young persons in provincial and territorial correctional services, annual (persons unless otherwise noted)*, CANSIM. (Accessed: March 21, 2017).

[21] Canadian Civil Liberty Association and Education Trust. (2014). *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention*. Retrieved from https://ccla.org/cclanewsite/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf.

[22] Burczycka, M & C, Munch. (2015). *Trends in offences against the administration of justice*. Statistics Canada, Catalogue no. 85-002-X.

[23] Statistics Canada defines a case as all charges against the same person having one or more key overlapping court dates (date of offence, date of initiation, date of first appearance, date of decision, date of sentencing).

an AOJO was the most serious offence in 15% of youth court cases, and in which 21% of cases resulted in custody sentences.[24]

Indigenous overrepresentation: Indigenous persons are overrepresented in the criminal justice system. In 2015/2016, Indigenous adults represented 28% of admissions to federal custody and 27% to provincial/territorial custody while representing 4.1% of the Canadian adult population. Similarly, Indigenous youth represented 39% of admissions to provincial/territorial youth custody while representing 7% of the youth population in the nine reporting jurisdictions. The overrepresentation of adult Indigenous women in provincial/territorial sentenced custody is more pronounced than that of Indigenous males: they accounted for 38% of female admissions to provincial/territorial sentenced custody, compared to 26% for Indigenous males.[25]

Indigenous people are also overrepresented as victims of crime. In its General Social Survey (GSS) on Victimization, Statistics Canada reported that, in 2014, more than one quarter (28%) of Indigenous people aged 15 and older reported that they, or their household, had been a victim of at least one of the eight types of offences measured by the GSS in the previous 12 months (compared to 18% of non-Indigenous people). Further, the overall rate of violent victimization, which includes sexual assault, physical assault and robbery, among Indigenous people was more than double the rate of violent victimization of non-Indigenous people (163 versus 74 incidents per 1,000 people). Statistics Canada also reported that, regardless of the type of violent offence, victimization rates were always higher for Indigenous people, compared to non-Indigenous people.[26]

Black Canadians overrepresentation: Black Canadians are also overrepresented in the criminal justice system. The Correctional Investigator, in its 2016-2017 report, stated that Black inmates represented 8.6% of the total incarcerated population, while representing 3% of the Canadian population. Black inmates were also overrepresented in admissions to segregation (10.5%) and in use of force incidents in correctional facilities (10.6%).[27]

Overrepresentation of Mentally Ill and Substance Addicted Persons: Individuals suffering from mental health issues or substance abuse problems are more likely to come into contact with the police, and this trend has increased in recent years. Statistics Canada reported[28] that of the 2.8 million Canadians aged 15 and older that met the criteria for at least one mental or substance use disorder (i.e., depression, bipolar disorder, generalized anxiety disorder, alcohol/cannabis/other drug abuse or dependence), one-in-three (34%) reported coming into contact with police for at least one reason in the

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[24] Miladinovic, Z. (2016). *Youth court statistics in Canada, 2014/2015*. Statistics Canada, Catalogue no. 85-002-X.
[25] Reitano, J. (2017). *Adult correctional statistics in Canada, 2015/2016*. Statistics Canada, Catalogue no. 85-002-X; Malakieh, J. (2017). *Youth correctional statistics in Canada, 2015/16*. Statistics Canada, Catalogue no. 85-002-X.
[26] Boyce, J (2016). *Victimization of Aboriginal people in Canada, 2014*. Statistics Canada, Catalogue no. 85-002-X.
[27] Office of the Correctional Investigator, *2016-2017 Annual Report*, page 55 and 56 (Last retrieved at http://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20162017-eng.pdf)
[28] Boyce, J., Rotenberg, C., and M. Karam (2015). *Mental health and contact with police in Canada, 2012*. Statistics Canada, Catalogue no. 85-002-X.

twelve months preceding their 2012 Canadian Community Health Survey (Mental Health). This was twice the proportion of those without a disorder (17%). As well, Canadians who reported a mental or substance use disorder were about four times more likely than those without a disorder to report being arrested by the police (12.5% and 2.8% respectively).

OVERVIEW OF BILL C-75

On March 29, 2018, the Government introduced Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts.* Bill C-75 proposes to:

- modernize and clarify bail provisions;
- provide an enhanced approach to administration of justice offences, including for youth;
- abolish peremptory challenges of jurors and modify the process of challenging a juror for cause and of judicial stand-by;
- restrict the availability of preliminary inquiries;
- streamline the classification of offences;
- expand judicial case management powers;
- enhance measures to better respond to intimate partner violence;
- provide additional measures to reduce criminal justice system delays and to make criminal law and the criminal justice system clearer and more efficient;
- restore judicial discretion in imposing victim surcharges;
- facilitate human trafficking prosecutions, and allow for the possibility of property forfeiture;
- remove provisions that have been ruled unconstitutional by the Supreme Court of Canada; and
- make consequential amendments to other Acts.

Bail
(Clauses 212, 214, 217, 227-229 and 237)

The bail system is intended to ensure that: (a) persons charged with a criminal offence will attend court to answer to the charge; (b) the accused will not pose a risk to public safety prior to their trial; and (c) confidence in the criminal justice system is maintained with respect to whether or not the accused is detained in the time period before their trial.[29] Where there are concerns that any of these objectives would be met if the accused were released after arrest, police can detain the accused and bring them before a justice, where they will have a right to a bail hearing to determine if they should be released. When releasing an accused, police or courts can impose certain conditions that accused are required to follow until the end of their trial.

[29] Section 515(10) of the *Criminal Code* contains these three grounds that justify the pre-trial detention of an accused.

The challenges facing the criminal justice system, specifically regarding remand and the overrepresentation of Indigenous persons and accused from vulnerable groups who are traditionally disadvantaged in obtaining bail, call for a careful look at Canadian bail law. As noted earlier, Statistics Canada reported that 60% of adults[30] in provincial/territorial correctional facilities and 58% of youth[31] in custody were denied bail and on remand. The current bail provisions in the *Criminal Code* have not been comprehensively amended since 1972, although they have been studied over the years, especially in light of the growing remand population. There have been many calls for reforms, including for comprehensive reform such as in the Senate Committee's Report[32], the Steering Committee[33] more discrete amendments from the Uniform Law Conference of Canada (Criminal Section) (e.g., Can-CBA 2012-0 on s. 525 of the *Criminal Code*, and BC 2010-03 on s. 516(2) of the *Criminal Code* (no-contact orders)). Many current bail rules are unnecessarily complex and/or redundant, which add to criminal justice system delays, without necessarily contributing to public safety.

The proposed bail amendments in Bill C-75 have also been guided by the rights of accused persons under the *Charter*, namely the right not to be denied reasonable bail without just cause under section 11(e), as well as the right to liberty and the presumption of innocence. The SCC in *Antic* (2017) recently affirmed that these rights require that an accused person not be denied bail without just cause and that any bail conditions placed on release be reasonable. The Honourable Wagner J. (now Chief Justice) writing for the Court, stated that the bail review judge's errors in *Antic* were "symptomatic of a widespread inconsistency in the law of bail" and that 'the bottom line so far has been that remand populations and denial of bail have increased dramatically in the *Charter* era". The Court emphasized a number of key principles and guidelines to apply in a contested bail hearing, including that releasing the accused without conditions should be the default position when granting release and that "release is favoured at the earliest reasonable opportunity on the least onerous grounds."

The proposed amendments would modernize and streamline the bail regime, while ensuring public safety, and help to maintain public confidence in the criminal justice system. Specifically, amendments seek to:

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[30] Statistics Canada, Table 251-0005 *Adult correctional services, average counts of adults in provincial and territorial programs, annual*, CANSIM. (Accessed: January 10, 2018). Analysis of data excludes "other temporary detention" such as immigration hold, material witness and police lock-up, which accounted for 3% of those in custody in 2015/2016.

[31] Statistics Canada, Table 251-0008 *Youth correctional services, average counts of young persons in provincial and territorial correctional services, annual (persons unless otherwise noted)*, CANSIM. (Accessed: March 21, 2017).

[32] Recommendation 31: "The committee recommends that the Minister of Justice prioritize reducing the number of persons on remand across Canada; and work with the provinces and territories to establish a plan for proceeding with appropriate reforms to the current bail regime". (Senate Standing Committee on Legal and Constitutional Affairs (June 2017). *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada)*

[33] Steering Committee on Justice Efficiencies and Access to the Justice System, *Report on Bail* (October 2016)

i) streamline the process by increasing the types of conditions police can impose on accused, so as to divert unnecessary matters from the courts and reduce the need for a bail hearing when one is not warranted;

ii) provide guidance to police on imposing reasonable, relevant and necessary conditions that are related to the offence and consistent with the principles of bail[34];

iii) legislate a "principle of restraint" for police and courts to ensure that release at the earliest opportunity is favoured over detention;

iv) require that circumstances of Indigenous accused and of accused from vulnerable populations are considered at bail, in order to address the disproportionate impacts that the bail system has on these populations;

v) create a new process, the "judicial referral hearing", to streamline certain administration of justice offences out of the traditional court system where no harm has been caused to victims; and,

vi) consolidate various forms of police and judicial pre-trial release to modernize and simplify the release process.

Intimate Partner Violence
(Clauses 1(3), 95(2), 99, 227(3) & (6), 296 and 297)

Despite increased efforts over the last 30 years to address violence against intimate partners, victimization by an intimate partner is one of the most common forms of police-reported violent crimes committed against women.[35] There is no specific offence of intimate partner violence in the *Criminal Code*, but rather, it spans a range of conduct and offences which can be committed against intimate partners, including assault (causing bodily harm, with a weapon, and aggravated assault), kidnapping and forcible confinement, sexual assault (causing bodily harm, with a weapon, and aggravated sexual assault), criminal harassment, uttering threats, and homicide. Between one-fifth to one-third of violent intimate partners reoffend, and the majority of this recidivism (61%) occurs within six months of the previous offence, with more than one-third (37%) occurring within three months.[36]

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[34] This principle is consistent with the Recommendation #34 of the Senate Committee Report which called for "the Minister of Justice to work with the provinces and territories to craft conditions of release for accused persons that will serve to protect the public while at the same time reducing the number of administrative of justice charges" (Senate Standing Committee on Legal and Constitutional Affairs (June 2017). *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada)*

[35] Burczycka, M. and S. Conroy (2017). *Family violence in Canada: A statistical profile, 2015*. Statistics Canada, Catalogue no. 85-002-X;

[36] Hanson, Helmus, & Bourgon, 2007; Hendricks, Werner, Shipway, & Turinetti, 2006; Ventura and Davis, 2004; Gondolf, 2000; as referenced in Cohen, I, McCormick, A and Plecas, D (2011). *Reducing Recidivism in Domestic Violence Cases.* University of Fraser Valley Centre for Public Safety & Criminal Justice Research. Retrieved from: https://www.ufv.ca/media/assets/ccjr/reports-and-publications/Reducing_Recidivism_in_Domestic_Violence_2011.pdf

Bill C-75 proposes amendments to the *Criminal Code* that would:

i) create a reverse onus at bail for accused charged with a violent offence involving an intimate partner, if they have a prior conviction for violence against an intimate partner;
ii) require courts to consider prior intimate partner violence charges when determining whether to release the accused or impose bail conditions;
iii) clarify that strangulation constitutes an elevated form of assault and a more serious form of sexual assault;
iv) defining "intimate partner" for all *Criminal Code* purposes and clarify that it includes current or former spouse, common-law partner and dating partner;
v) make clear that current sentencing provisions, which treat abuse against a spouse or common law partner as an aggravating factor, apply to both current and former spouses/common law partners and dating partners; and,
vi) allow a higher maximum penalty in cases involving a repeat intimate partner violence offender.

In addition to supporting the Government's 2015 electoral commitments to enhance victim safety and to toughen the criminal law response to domestic assault, it is expected that these amendments would standardize practices to improve the efficiency and effectiveness of the criminal justice system, while respecting the rights of the accused and maintaining public safety. Changes would further assist in improving bail court efficiencies, and better protect victims of intimate partner violence.

Administration of Justice Offences
(Clauses 214 and 236)

Administration of justice offences (AOJOs) are offences committed against the integrity of the justice system. The most common AOJOs include failing to comply with bail conditions (i.e., disobeying a curfew, drinking alcohol), failing to appear in court and breaches of probation (e.g., failing to report to a probation officer). Over the years, the number of individuals charged with AOJOs has been increasing, despite a consistent decrease in the volume and severity of crime in Canada: in 2014, police reported that the rate of persons charged with an AOJO increased by 8% since 2004 (compared to 20% decrease in rate of persons charged with other *Criminal Code* offences).[37]

Throughout the criminal justice process, from arrest to sentencing, AOJOs affect profoundly the efficient functioning of Canada's justice system. AOJOs represent about one-in-ten incidents reported by the police, while four-in-ten cases in adult criminal courts include at least one AOJO, most of which result in a guilty verdict and a jail sentence[38] AOJOs have contributed to an increase in pre-trial

[37] Burczycka, M & C, Munch. (2015). *Trends in offences against the administration of justice*. Statistics Canada, Catalogue no. 85-002-X.
[38] Ibid.

detention, and also to the overrepresentation of Indigenous persons and of individuals from vulnerable populations in the criminal justice system.

In addition to responding to the Senate Committee's recommendation regarding administration of justice offences[39] and the recommendations made by the Steering Committee[40], the measures included in Bill C-75 would change the way certain AOJOs are processed in the criminal justice system, and, as a result, reduce their consequential pressures. It would provide an opportunity for individuals' personal circumstances and attributes to be taken into account in dealing with these types of offences. Moreover, it would promote consistency in law enforcement approaches across Canada, reduce the increasing number of AOJO charges, ensure respect for the *Canadian Victims Bill of Rights*, and maintain public safety.

The proposed approach, similar to the approach taken in New South Wales (Australia) under its *Bail Act*[41] would provide a process to help the police and courts deal more effectively with certain AOJOs, such as failures to comply with conditions of release and failures to appear in court. When the failure has not caused harm to a victim, including physical, psychological or financial harm (e.g., property damage or economic loss), the police and Crown Attorneys could direct AOJOs to a judicial referral hearing as an alternative to charging the accused with an AOJO. At the judicial referral hearing, the judge would review any existing conditions of release and could decide to take no action, release the accused on new conditions or detain the accused, depending on the particular circumstances of the accused (e.g., mental health issues, existence of neurocognitive disorders such as FASD, addictions, homelessness).

This new procedure would not impact current police powers relating to making a decision on whether or not to lay charges. It would instead enhance police and prosecutorial discretion by allowing them to compel an accused to appear at a judicial referral hearing as an alternative to laying charges, when it is considered appropriate under the circumstances and when it is felt that the alleged breach should still be brought to the attention of a judge or justice. It would provide another tool for police, prosecutors and courts to deal more effectively with these AOJOs (i.e., failures to comply with conditions of release, and failures to appear in court or as required) not involving harm to victims (including physical, emotional and financial harm).

Since a judicial referral hearing reviews the conditions imposed after an accused was charged with an earlier offence, as opposed to considering the guilt or innocence of the accused in relation to an alleged

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[39] Recommendation 33: "The committee recommends that the Minister of Justice prioritize the reduction of court time spent dealing with administration of justice offences and develop alternative means of dealing with such matters with the provinces and territories." (Senate Standing Committee on Legal and Constitutional Affairs (June 2017). *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada)*

[40] Steering Committee on Justice Efficiencies and Access to the Justice System, *Report on Bail* (October 2016)

[41] Division 4, Part 8 of *Bail Act 2013* No 26, New South Wales Government (Last retrieved at: https://www.legislation.nsw.gov.au/#/view/act/2013/26.)

AOJO, the AOJO itself would not appear on a criminal record. No finding of guilt or innocence would be made at the judicial referral hearing and any charges that may have been laid regarding that specific AOJO would be dismissed by the judge or the justice once a decision is made with respect to the release status of the accused.

If an accused does not attend their judicial referral hearing, they could not be charged with the offence of failure to appear: the police officer would have the choice of dropping the matter, offering the accused another hearing, or charging the accused for the breach that was to be addressed through the judicial referral hearing.

Youth Criminal Justice Act (YCJA)
(Clauses 364-366, 370-372, 374-378)

The *YCJA* has significantly reduced the overall use of the formal court system and custody for youth. Under the *YCJA*, the majority of youth accused of an offence are dealt with by means other than a charge, and the youth incarceration rate has declined 65% since 2003.[42]

That said, 85% of youth accused of AOJOs are formally charged[43], and AOJOs represent 20% of youth court cases, and 35% of cases resulting in custody.[44] These high rates of charging and custody for AOJOs remain an area of concern and contribute both to delays and to the overrepresentation of vulnerable young people and Indigenous youth in the youth criminal justice system. The aim of the proposed *YCJA* reforms is to strengthen aspects of the current *YCJA* approach so that fewer youth are prosecuted and incarcerated for AOJOs.

Too often young people, particularly vulnerable young people, are subject to a myriad of conditions, many of which relate more to their social welfare needs than to criminal justice purposes. Conditions such as curfews, or the requirement to obey parents or obey the rules of the young person's house where they reside, often lead to breach charges for behaviour that is not otherwise criminal. Bill C-75 would require that a condition be imposed on a young person only if it is reasonable in the circumstances and required for criminal justice purposes. The Bill would also prohibit police officers and judges from detaining young persons in custody, or imposing conditions of release (in an undertaking or a release order), as a substitute for appropriate child protection, mental health or other social measures.

With respect to options for responding to AOJOs, Bill C-75 would set out the circumstances in which extrajudicial measures, which are alternatives to charges, are deemed to be adequate to hold a young person accountable for breaches of conditions and failures to appear at the bail stage, and for breaches of community-based youth sentences. Furthermore, the Bill would identify the circumstances in which the

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[42] Statistics Canada – Table 251-0008 – *Youth Correctional Service – Average Counts of Youth in Provincial/Territorial Correctional Services*, CANSIM.
[43] Statistics Canada – Table 252-0051 – *Incident-based Crime Statistics*, CANSIM.
[44] Miladinovic, Z. (2016). *Youth court statistics in Canada, 2014-2015*. Catalogue no. 85-002-X.

new *Criminal Code* judicial referral hearings at the bail stage (see above) and existing YCJA provisions relating to reviews of community sentences should be used as alternatives to charges.

Currently under the *YCJA*, a young person who fails to comply with a community-based youth sentence can be brought back before the youth court for a review, and the youth court judge can make changes to the original sentence. These reviews provide an opportunity to address circumstances of non-compliance without resorting to further charges and prosecution. Bill C-75 would provide the court with authority to impose, without consent of the young person, additional conditions to better protect against any risk of harm to the public or to help the young person to comply with the sentence, in circumstances where the review is held because a young person has breached, without reasonable excuse, a probation order or an intensive support or supervision order.

Finally, while the *YCJA* sentencing options and maximum sentence lengths would not change under Bill C-75, the criteria for custodial sentences would be modified so that AOJOs would be less likely to lead to custody for youth.

Preliminary Inquiries
(Clauses 240-244)

Part XVIII of the *Criminal Code* sets out the purpose of, and procedural rules regulating the conduct of, the preliminary inquiry. The Supreme Court of Canada clearly established in *R v S.J.L.* (2009) that there is no constitutional right to a preliminary inquiry and the failure to allow cross-examination is not in itself a violation of the *Charter*, as long as the prosecution's evidence and a summary of the witness' statement are disclosed. The use of preliminary inquiries varies across the country and, in some instances, is complemented or even replaced by an out-of-court discovery process in various court locations in Ontario and Quebec.

Although preliminary inquiries are associated with a very small proportion of the total number of completed cases in Canadian criminal courts (approximately 3% of all completed cases, a proportion that has slowly decreased over the last 10 years[45]), restricting the availability of this procedure to offences liable to life imprisonment would significantly reduce their number[46], while maintaining its availability for the most serious offences. This reduction will free up court time and resources in provincial courts, while alleviating the burden on some witnesses and victims by preventing them from having to testify twice in those cases.

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[45] Maxwell, A. (2018). *Adult criminal court processing times, Canada, 2015/2016*. Catalogue no. 85-002-X.
[46] Estimated to be 87%, according to 2014/2015 Integrated Criminal Court Survey, Canadian Centre for Justice Statistics (Statistics Canada).

Charges with a preliminary inquiry only accounted for 7% (N=4,610) of all the charges that exceeded the *Jordan* presumptive ceiling for delay in 2015/2016, but took more time to reach a final decision (median of 433 days) than charges that did not have a preliminary inquiry (median of 106 days). These charges also required more court appearances to reach a final decision (median of 13 appearances, versus 6 appearances for charges without a preliminary inquiry), and had a higher average number of days between court appearances (average of 38 days between appearances for charges with a preliminary inquiry, versus 27 days for charges without a preliminary inquiry). Statistics Canada reported similar trends for superior court charges.[47]

Generally, a preliminary inquiry will take place if an accused person charged with an indictable offence elects to be tried before the Superior Court and requests one. The preliminary inquiry is to determine whether there is sufficient evidence to put the accused to trial for the offence charged or any other offence in respect of the same transaction. In this way, the preliminary inquiry serves a screening function. Over time, however, this procedure has developed other functions such as providing the Crown and the defence with an opportunity to examine and cross-examine witnesses and test their credibility.

Since coming into force on July 1st, 1893, the preliminary inquiry provisions of the *Criminal Code* have only been substantially modified once[48] by the *Criminal Law Amendment Act, 2001,* which made the preliminary inquiry on request rather than automatic, and aimed at encouraging the parties to consider whether a preliminary inquiry is necessary in individual cases, and if so, whether the scope of the issues and duration of the hearing could be limited.

The proposed amendments in Bill C-75 would restrict preliminary inquiries for adults accused of offences liable to life imprisonment (e.g., murder, instructing the commission of an indictable offence for a criminal organization or terrorist group, etc.). The proposed changes do not impact youth tried with criminal offences under the *Youth Criminal Justice Act*.

Amendments would further allow the justice conducting a preliminary inquiry to limit the issues to be explored and the witnesses to be heard at the inquiry. In doing so, the amendments would help prevent vulnerable witnesses from having to testify twice, would further narrow the scope of the inquiry with a view to making it more efficient and effective, while maintaining the other benefits of this procedure such as, discovery at the earlier stages of the criminal justice process.

Preliminary inquiry reform has been a topic of debate in the Canadian legal community for decades. For instance, the Steering Committee has discussed the issue over the years, and in 2017, mandated the Department of Justice Canada to undertake a survey on preliminary inquiries.[49] As well, legal

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[47] Maxwell, *supra* note 45.
[48] S.C. 2002, c. 13
[49] In April 2017, data was collected from 1,969 Crown prosecutors, judges, police, defense counsel, legal aid counsel and victim stakeholders. See Annex A for more information.

academics, such as Webster and Bebbington[50] and Doob[51] have provided analysis and commentary on this issue.

The amendments outlined above are the result of significant discussion and consultation in various fora, including federal-provincial-territorial meetings and at meetings of the Uniform Law Conference of Canada[52], and represents a balanced approach between those who seek a bolder direction and those who strongly oppose any changes that reduce the availability of this procedure. In *Jordan*, the Supreme Court of Canada noted[53] that Parliament should "consider the value of preliminary inquiries in light of expanded disclosure obligations." Also, in its 2017 final report on delays, the Senate Standing Committee on Legal and Constitutional Affairs took a similar view as the Supreme Court of Canada's position in Jordan by recommending that preliminary inquiries be "restricted or eliminated".

Though a formal analysis was not conducted, it is reasonable to assume that the Supreme Court of Canada's decision in *R v Stinchcombe* (1991) outlining the Crown's disclosure obligations, had a significant impact on preliminary inquiries, including on the number of these held and/or scheduled. Furthermore, a two-phased impact assessment of amendments to the preliminary inquiry enacted by former Bill C-15A, *An Act to amend the Criminal Code and to amend other Acts* (S.C. 2002, c.13) was conducted by the Research and Statistics Division of the Department of Justice. The unpublished findings showed, among other things, that in the year following the implementation of Bill C-15A, Quebec had a 68% decline in the number of preliminary inquiries held while British Columbia, New Brunswick and Nunavut experienced a 20% decline; there were limited changes to the time and number of appearances required for a case with a preliminary inquiry to be processed through the court system. These results suggest that the legislative changes made by Bill C-15A may have, to some extent, reduced the number and scope of preliminary inquiries in some jurisdictions.

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[50] Webster, C.M. & Bebbington, H.H. (2013). *Why Re-open the Debate on the Preliminary Inquiry? Some Preliminary Observations*. Canadian Journal of Criminology and Criminal Justice, Volume 55, Number 4, pp.513-531.
[51] Doob, A.N. (2005). *Backlog is not the Whole Problem: The Determinants of Court Processing Time in Canadian Provincial and Territorial Courts*. Prepared for the Department of Justice Canada.
[52] Criminal Section Minutes of the 2007 Meeting in Charlottetown; Resolution Number NL 2005-02.
[53] [2016] 1 S.C.R. 631, paragraph 140.

Reclassification of Offences
(Clauses 318 & 319 plus many others)

Criminal Code offences are classified as summary, indictable or both (hybrid). Summary offences are generally intended to target less serious conduct (e.g., causing a disturbance, trespassing at night) for which the current default maximum penalty is normally a fine not exceeding $5,000 fine, six months in prison, or both. Maximum imprisonment penalties for summary conviction offences, however, vary and some are punishable by two years less a day.

Indictable offences address more serious matters (e.g., aggravated assault, robbery, murder) for which the maximum penalties range from 2 years to life imprisonment. On indictment, the courts also have the ability to impose a fine in their discretion, in addition to other sentencing options. The third class of offences - hybrid offences - target types of conduct for which the seriousness can vary greatly depending on the circumstances of the case. Hybrid offences allow the Crown to choose whether to proceed by indictment or summary conviction. Decisions on how to proceed will be based on a variety of factors including, for example, the seriousness of the alleged conduct, any previous convictions, and the type of sentence the Crown intends to seek, given all the circumstances of the alleged offence and offender.

Offence classification determines where the case can be heard depending on the seriousness of the conduct, background of the offender and impact on victims. It is not simply a reflection of the seriousness of the offence, based on the hypothetical worst case. All summary conviction matters are tried in the provincial courts. The vast majority of criminal matters are heard by provincial court judges across Canada. Indictable offences can be heard in both provincial and superior courts, depending on the election of the accused, although there are some indictable offences that can only be heard in superior court. Generally speaking, matters that are tried in provincial court tend to proceed more quickly. Provincial court cases had a median case length of 120 days and a median of 5 appearances; superior court cases had a median case length of 565 days and a median of 15 appearances.[54] The hybridization of a number of indictable offences in Bill C-75 would provide prosecutors with the flexibility to proceed summarily for a greater number of offences, in appropriate cases, leaving the more serious cases involving these offences to be tried by the superior courts, with or without a jury. This would help to ensure that these cases would be dealt with more expeditiously and would also help to ensure that superior courts would address the most serious matters.

Bill C-75 proposes to hybridize 136 indictable offences. Of these, 40 offences are punishable by a maximum penalty of 10 years imprisonment, a further 55 offences are punishable by a maximum of 5 years imprisonment and 41 are punishable by a maximum of two years imprisonment. In addition to hybridizing offences, Bill C-75 would change the default maximum penalty for summary conviction offences from 6 months to 2 years less a day of imprisonment; and, extend the limitation period for all

[54] Maxwell, A. (2017). *Adult criminal court statistics in Canada, 2014/2015*. Statistics Canada, Catalogue no. 85-002-X. Note Superior Court data is not available from PEI, Ontario, Manitoba and Saskatchewan.

summary conviction offences to 12 months (from the current 6 months). A limitation period is the time frame within which a charge, to be tried by summary conviction procedure, must be laid, as calculated starting from the date of the alleged offence. This change complements the broader changes to offence classification. It would ensure that police officers have time to investigate the more complex cases and provide the Crown with the flexibility to proceed in provincial court for a greater number of less serious cases. A broader range of offences being hybridized will result in more efficient prosecutions, ensuring that cases are tried according to the seriousness of the alleged commission of the offence, and not simply the worst hypothetical case. This will have a positive impact on bringing accused persons to trial within a reasonable time, as required by the *Charter*.

This is also expected to assist in reducing delays in the superior court, including the time from first appearance to disposition of criminal cases. Hybridization assists in ensuring that the additional procedural safeguards available when proceeding by indictment, including preliminary inquiries and jury trials, continue to be made available for more serious cases and that the sentence sought justifies these additional processes. These amendments would also ensure that sentencing ranges reflect the manner in which offences are prosecuted and would reduce the number of offences being prosecuted by indictment when a summary conviction penalty is most appropriate in all of the circumstances. The same resulting sentence could be achieved through summary conviction processes with less strains on the criminal justice system.

The proposed harmonization of the default maximum penalty of two years less a day for summary conviction offences would ensure a consistent and clear standard. Although the proposed change to the default maximum penalty would also mean that, for some existing summary conviction offences, the maximum penalty would increase, it is important to note that this change is not a signal from Parliament that these offences should be punished more seriously. That is not the objective of the proposed change, nor is it the anticipated effect. Rather, the goal is to standardize the approach to summary conviction offences after years of piecemeal reform to maximum penalties and limitation periods. The fundamental principles of sentencing continue to apply, so that sentences imposed should always be proportionate to the seriousness of the actual commission of the offence, including impact on victims, and the offender's degree of blameworthiness. Hybridization is not a reflection of the seriousness of the offence, but the degree of seriousness of the actual *commission* of that offence, taking into consideration all of the circumstances.

Judicial Case Management
(Clauses 252, 253 and 269)

Judicial case management is repeatedly cited as one of the key measures to improve the efficiency and effectiveness of the criminal justice system. As noted by the SCC in *Cody* (2017), judges are uniquely positioned to encourage and foster the culture change required to ensure the proper functioning of the system. Effective judicial case management ensures the prioritization and careful balancing of court

resources. Enhanced case management refers to stronger judicial control of proceedings, whereby judges exercise a more active leadership role in ensuring that cases progress in a just and timely manner.

Furthermore, in their Final Report, the Senate Committee included as a priority recommendation "that the Minister of Justice work with the provinces and territories and in particular with the judiciary to:

- stress the need for judges to improve case management, such as by imposing deadlines and challenging unnecessary adjournments, using the tools that already exist; and
- consider making amendments to the *Criminal Code* to support better case management as necessary."[55]

In 2011, amendments to the *Criminal Code* granted case management powers to a judge where it is necessary for the proper administration of justice. These are broad powers and encompass scheduling, evidentiary, procedural and substantive issues. When properly mobilized by a case management judge, proceedings can be streamlined, litigation focused and case momentum maintained through setting deadlines and ongoing oversight.

Section 551.1 of the *Criminal Code* generally regulates the appointment of a case management judge, including the timing of the application for this appointment (i.e., for indictable offences to be tried before the Superior Court, after the indictment is filed). Some have argued that this timing is too late in the process to fully benefit from the case management judge's involvement and assistance at the early stages of the process.

The proposed amendments are intended to strengthen the powers of case management judges by, among other things, allowing for their appointment at the earliest point in the process, ensuring they be involved in prompt resolution of preliminary issues and management of cases, and to assist in the timely and just completion of criminal matters.

Furthermore, criminal cases are generally tried in the community in which the offence has allegedly occurred. However, section 599 of the *Criminal Code* allows a judge of the court before whom the accused is to be tried, to order, in certain circumstances, that the trial be held in a different location within the province. A change of venue seeks to safeguard the accused person's and society's interests in a fair trial.

The amendments would give a case management judge the express ability to make change of venue orders. Permitting this at the earlier stages of the process would prevent a potential duplication of efforts and expending resources where preparations are made at one location, only to be moved to another location later in the process. In deciding whether to order a change of venue, the Court would have to

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[55] Recommendation #13 in Senate Standing Committee on Legal and Constitutional Affairs (June 2017). *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada*.

consider whether it would promote a fair and efficient trial and ensure the safety and security of a victim or witness or protect their interests and those of society.

These amendments to the *Criminal Code* speak directly to the work of the Steering Committee on this priority area[56] as well as the Senate Committee's recommendation to enhance case management by providing additional tools and the earlier exercise of these tools.[57]

Routine Police Evidence
(Clauses 278 and 294)

The presentation of evidence in a criminal trial often results in police officers being taken off the street for extended periods of time in order to give testimony on issues that are frequently uncontested and/or peripheral to the key issues in the proceedings. Allowing the use of written evidence with regard to routine police evidence would be expected to reduce the time and financial burden on police officers who are required to testify in court over lengthy periods of time, or provide the same evidence twice (for example, in a preliminary inquiry and at trial). As well, these measures would increase efficiencies in court by minimizing some of the time spent on hearing undisputed oral testimony from police officers in circumstances, where that testimony could be provided in writing without negatively impacting the accused's right to full answer and defence.

Consistent with the Senate Committee's recommendation to this effect[58], the Bill proposes measures that would enable certain evidence of police officers to be received in writing, rather than by the more time-consuming oral testimony:

- to make admissible at trial the transcript of testimony given by a police officer earlier in the proceedings, either at the preliminary inquiry or on a *voir dire* (for example, a *voir dire* on the constitutionality of the accused's arrest)(Clause 294); and,
- to give the court discretion, in any proceeding, to admit the evidence of a police officer by way of an affidavit, rather than by requiring the officer to testify (Clause 278). Unlike most existing measures that allow for certain evidence to be provided to the Court in writing (e.g. drug analysis certificates and breathalyzer analysis certificates), a routine police evidence affidavit would not be presumptively admissible. The Court is to be guided by the overall question of whether receiving the evidence in the form of an affidavit would be in the interests of justice. Specific factors to guide this exercise of the Court's discretion include, whether the evidence is central or

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[56] Steering Committee on Justice Efficiencies and Access to the Justice System, *Report on Early Case Consideration* (October 2006), and *Model Guidelines on Judicial Case Management in the Criminal Justice System* (October 2016)
[57] Senate Committee, *supra* note 55.
[58] Recommendation #28: "The committee recommends that the Minister of Justice review the *Criminal Code* and other criminal laws in order to make appropriate amendments that indicate standard and routine types of evidence that should be automatically disclosed as part of criminal proceedings before the start of trial" (Senate Standing Committee on Legal and Constitutional Affairs (June 2017). *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada).*

peripheral to the matter before the Court, whether the accused intends to challenge the evidence, and the accused's right to full answer and defence. Even if the evidence is received in writing, the Court can still require the attendance of the police officer for the purpose of being cross-examined by the accused, wherever there is a basis for doing so.

Rules of Court
(Clauses 188(1), 188(2), 189(2) and 309)

Sections 482 and 482.1 of the *Criminal Code* allow courts to make rules, including case management rules, to regulate certain court functions and delegate certain administrative tasks to court personnel. The rules of certain courts under these provisions are subject to the approval of the lieutenant governor in council of the province. Also, section 745.64 allows the appropriate Chief Justice to set out the procedural application process to seek the reduction in the number of years of imprisonment without eligibility for parole for certain offences. Rules made pursuant to section 745.64 are "statutory instruments" for the purposes of the *Statutory Instruments Act (SIA)*, and thus are subject to examination by the Department of Justice to, among other things, optimize the quality of the text and ensure their coherence with other federal legislative texts in accordance with the criteria set out in the *SIA*. Rules made under sections 482 and 482.1 are not "statutory instruments", and thus are not subject to this examination. Rules made under the three provisions noted above must be published in Part II of the *Canada Gazette*.

The administrative process by which these rules are enacted can result in unnecessary delay in their implementation. In light of *Jordan*, courts are also engaged in implementing additional measures, some by way of rules of court, to ensure the timely completion of criminal matters. As such, amendments to the *Criminal Code* would expedite the rule-making process and ensure their effective and prompt implementation by removing the requirement in the *Criminal Code* that the rules of certain courts need to be approved by the lieutenant governor in council and that rules of court enacted under these provisions must be published in the *Canada Gazette*. Although the publication requirement would be maintained to maximize access to justice, courts would choose the most appropriate medium by which this can be achieved (i.e., on their website, provincial Gazettes or case law reports). Bill C-75 would state that the *SIA* does not apply to rules made under 745.64.

Additional Efficiency Measures

Remote Appearances
(Clauses 1(2), 190, 218, 227(2), 293, 295)

Currently, the general rule is that all persons involved in the criminal justice process must appear in person, unless otherwise specified in the *Criminal Code*.

The *Criminal Code* currently includes numerous provisions relating to the remote appearance of certain individuals involved in criminal justice processes. However, these are subject to different criteria depending on the individual (e.g. accused, witness, counsel) and stage of the proceedings (e.g., judicial interim release, preliminary inquiry, trial, appeal, etc.).

The proposed amendments are intended to modernize and facilitate the appearance by audioconference or videoconference of all persons involved in criminal cases, including a judge or justice, throughout the criminal justice process, under certain circumstances and, in some situations, in consideration of certain factors.

These amendments would serve the proper administration of justice, including by ensuring fair and efficient proceedings and enhancing access to justice for all Canadians. These amendments would set out the situations in which a remote appearance can occur, which will depend on the individual circumstances and stage of the process and, in some situations, such factors as: the accused's right to a fair trial; the nature of the witness's anticipated evidence; the inconveniences to the witness to appear physically; the seriousness of the offence; and costs. In certain situations, the Court would be required to record the reasons for refusing to order a remote appearance or for holding a hearing remotely.

In their Final Report, the Senate Committee recommended[59] that the "Minister of Justice ensure that resources are invested in technological solutions to the problems presented by small, scattered populations in remote and isolated communities". The Report specifically called for increased use of videoconferencing technology "so that court appearances such as bail hearings and interlocutory applications can be conducted remotely and without the need for an accused person to be removed from his or her community."

The amendments in Bill C-75 directly responds to this recommendation by expanding the use of technology to facilitate remote appearances by all persons involved throughout the criminal justice process, including in remote and isolated communities.

Guilty Pleas
(Clauses 270(1) and (2))

Most criminal charges do not result in trials and are resolved by either guilty pleas or charges being dismissed. A guilty plea can spare victims from testifying, save court time and provide some certainty to the accused on the outcome of their case, including in some instances, a reduced sentence.

Currently, subsection 606(1.1) of the *Criminal Code* provides that a court may accept a guilty plea only if it is satisfied:

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[59] Recommendation #49 in Senate Standing Committee on Legal and Constitutional Affairs (June 2017). *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada.*

- that the accused is making the plea voluntarily;
- that the accused understands that a guilty plea is an admission of the essential elements of the offence and the nature and consequences of the plea; and,
- that the accused understands that the court is not bound by any agreement with the prosecutor.

Accused who are innocent may falsely plead guilty for ulterior reasons, such as being denied bail or wanting to avoid a lengthy wait for trial. It is not known how often false guilty pleas occur, but concerns have been raised about the potential prevalence of this issue, particularly with respect to Indigenous accused and accused from vulnerable populations (e.g., those who suffer from mental health issues, addictions, neurocognitive disorders, etc.) who may plead guilty without fully appreciating the circumstances of the offence or the significance of a guilty plea.[60] The proposed amendment would provide greater clarity to the current plea inquiry process in order to add a requirement in subsection 606(1.1) that the Court be satisfied that the facts support the charge before the Court accepts a guilty plea. The amendment mirrors a similar provision contained in the YCJA that applies to youth in the criminal justice system. The change is intended to provide an additional safeguard against false guilty pleas, while continuing to encourage early case resolution, enhance the integrity of the administration of justice, and strive for efficiencies.

Prosecutorial Authority
(Clauses 2, 4(1), 30-31, 181, 187, 266, 267)

While provincial Attorneys General have primary responsibility for criminal prosecutions in Canada, the Attorney General of Canada (AGC), through the Public Prosecution Service of Canada, prosecutes:

- all federal offences outside the *Criminal Code* (including drug offences in the *Controlled Drugs and Substances Act*), which employ the procedures under the *Criminal Code*;
- *Criminal Code* offences in the three Territories; and,
- certain *Criminal Code* offences, under circumstances as expressly set out in law (for example, terrorism offences, securities fraud offences, and organized crime) throughout Canada.

The *Criminal Code* contains specific rules regarding the powers of the AGC to prosecute certain offences or to invoke criminal procedures.

The proposals seek to modernize and consolidate these authorities to make clearer that where the AGC is the prosecutor, they can prosecute all related aspects of the case, including the inchoate form of the

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[60] Bressan, A., & Coady, K. (2017). *Guilty pleas among Indigenous people in Canada*. Research and Statistics Division. Ottawa, ON: Department of Justice Canada. (Last retrieved at: http://publications.gc.ca/collections/collection_2018/jus/J4-62-2017-eng.pdf)

offence (e.g., attempt or conspiracy to commit), and all ancillary and related proceedings (e.g., forfeiture and proceeds of crime).

Judicial Signatures
(Clauses 3, 264(1,2), 287, 289 (1-4), 321 and 287, 333-337, 341-348, 350-356)]

A clerk of the court will most often prepare court orders or other documents reflecting judicial pronouncements made from the bench, and sign such documents. Likewise, clerks of the court are permitted to prepare and sign many *Criminal Code* forms which record a judicial pronouncement. At common law, the act of preparing and signing court documents is considered administrative in nature and can be delegated to clerks of the court. Currently, only a few *Criminal Code* provisions specifically provide that a clerk of the court can prepare and sign such documents. This creates a lack of uniformity in the *Criminal Code* with respect to which court documents a clerk of the court may sign.

In addition, the signature line of a number of forms does not reference "clerk of the court" even though the purpose of some forms is to record a judicial pronouncement. Furthermore, the names of judicial officers on the signature line are not consistently set out for some of those forms.

The proposed amendments would provide for the signing authority of clerks of the court who record judicial pronouncements made from the bench, unless otherwise provided for in the *Criminal Code* or ordered, and would codify the common law regarding the authority of judicial officers to delegate to clerks of the court the administrative act of signing court documents that records such pronouncements. Amendments would also be made to the signature line of some *Criminal Code* forms to add greater clarity and consistency surrounding the authority of clerks of the court to sign forms that are used to record judicial pronouncements made from the bench.

Clarifying the authority of a clerk of the court to sign such documents is intended to facilitate the administration of justice and enhance efficiencies in criminal court case processing.

Re-election Timeframe for Mode of Trial

Re-election by accused after the completion of the preliminary inquiry
(Clause 256(1))

Currently, the *Criminal Code* provides that an accused may re-elect another mode of trial other than a trial by a provincial court judge (namely, judge alone or judge and jury) as of right, at any time during their preliminary inquiry or before the 15th day following its completion. Further, the *Criminal Code* specifies that after this period, the accused may only re-elect with the written consent of the prosecutor. This period (i.e., before the 15th day following the completion of the preliminary inquiry) is considered too restrictive and limits the accused's opportunity to fully assess the numerous issues related to their re-election. The period of time during which an accused can re-elect as of right must be sufficient to

allow them to take the necessary steps to make an informed decision on re-election, but should not unnecessarily prolong the period so as to impact the effectiveness of the criminal justice system.

The proposed amendment would amend the current timeframe to allow the accused to re-elect a mode of trial at any time during their preliminary inquiry or before the 60th day following the completion of the preliminary inquiry. This balanced approach would provide sufficient time for the accused to fully assess the evidence adduced at the preliminary inquiry in order to make an informed decision with respect to re-election, while bringing a sense of finality to the accused's election soon after the preliminary inquiry.

Re-election by accused before the first day appointed for trial
(Clause 256(1)

Currently, subsection 561(2) of the *Criminal Code* provides that an accused who elects to be tried by a provincial court judge or does not request a preliminary inquiry may, not later than 14 days before the first day appointed for trial, re-elect as of right to another mode of trial; after that time, written consent of the prosecutor is required. A re-election at such a late point in the proceedings (i.e., 14 days before the day first appointed for trial) results in the cancellation of the trial, negatively impacting the efficiency of the criminal justice system as a result of, among other things:

- the resources required to summon witnesses to trial have likely already been invested;
- the additional resources required to notify witnesses that their subpoenas are cancelled;
- the inconveniences experienced by witnesses; and,
- the court time that was reserved for the trial becomes available, in most cases, too late to be used for another trial or procedure.

To address this issue, the *Criminal Code* would be amended to provide that an accused may re-elect as of right another mode of trial, not later than 60 days before the first day set for trial. This would ensure that steps required to prepare for trial (as noted above) are not taken unnecessarily where the trial is cancelled as a result of the re-election. It would also provide, in some cases, sufficient lead time to allow for the re-allocation of court time and resources to other matters. Accused persons would retain the ability to re-elect another mode of trial after that timeframe with the written consent of the prosecutor.

Out-of-Province Warrants
(Clauses 19, 68, 154, 182, 183, 193(1)(2), 194, 195, 197, 198, 199, 203, 209, 210, and 388)

The endorsement of an out-of-province warrant by a judicial officer in the executing jurisdiction is one mechanism by which the *Criminal Code* makes a warrant valid for execution in another province. The proposal would remove the out-of-province endorsement requirements for search warrants and wiretap authorizations in the *Criminal Code* and the *Controlled Drugs and Substances Act*, and provide that these warrants, authorizations and investigative orders have effect anywhere in Canada upon issuance by

a justice or a judge. These amendments would contribute to streamlining investigative procedures by saving valuable time as well as police and judicial resources.

Removing this requirement also implements a 2016 recommendation by the Uniform Law Conference of Canada working group on endorsements of out-of-province search warrants, which was of the view that the out-of-province investigative warrants and wiretap authorizations can be more effectively executed by making warrants enforceable across Canada without the need for endorsement.

Juries
(Clauses 271-275)

Continuation of trial without jury

A mistrial ordered as a result of a jury being reduced to below the minimum ten jurors is an unfortunate interruption in the pursuit of justice. Such orders have significant repercussions on criminal justice system resources, are distressing to those involved, the jurors and the witnesses, and undermine public confidence in the administration of justice.

The *Criminal Code* currently allows for 13 or 14 jurors to be sworn where the trial judge considers it advisable in the interests of justice. In making this decision, the judge considers, among other things, the risk that a mistrial could result from the discharge of too many jurors.

Furthermore, the *Criminal Code* provides that, unless the court is satisfied that it would not be in the interests of justice, rulings on preliminary motions (disclosure, admissibility of evidence, and *Charter* motions) made during the first trial are binding in any new trial resulting from a mistrial. Therefore, there may be greater incentive to simply continue the proceedings without the jury, rather than seeking a new trial and start from the presentation of the evidence on the merits before another jury.

Additionally, although the judge's role in a jury trial is primarily to adjudicate questions of law, the judge nonetheless follows the evidence adduced very closely as it is the judge's responsibility to, among other things, determine its admissibility and to rule on all objections. Moreover, in jury trials, judges generally include a summary of the evidence in their charge to the jury.

The proposed amendments would, on consent of the parties, allow a judge to continue the trial without the jury and render a verdict when the jury is reduced to below ten jurors. Although this would not be utilized in all cases, it would prevent some mistrials as there will be some situations where accused persons will prefer an expedient resolution of their case and choose to continue the trial with a judge sitting without the jury rather than starting a new trial.

Power to stand aside jurors

Section 633 of the *Criminal Code* gives a judge the power to stand aside (or "stand by") jurors for reasons of personal hardship or any other reasonable cause. The term "other reasonable cause" includes obvious instances of juror bias (e.g., where a juror is related to a witness in the case). The effect of standing aside a juror is to enable the judge to move to the next prospective juror and in cases where a full jury is subsequently confirmed, those who were stood aside are dismissed.

Section 633 of the *Criminal Code* would be amended to permit a judge to stand aside a juror to maintain public confidence in the administration of justice. This tool would help to ensure that potential jurors are impartial and capable of performing their duties, if selected. The concept of maintaining public confidence in the administration of justice is already used in other parts of the *Criminal Code* and has been interpreted by the SCC in *St-Cloud* (2015) in the context of bail. In this context, decisions would be made on a case by case basis and be based on all relevant circumstances, including the importance of ensuring that the jury is impartial, competent and representative. The proposed amendment would recognize and enhance the role of judges in promoting an impartial, representative and competent jury.

Peremptory challenges

Section 634 of the *Criminal Code* sets out the rules governing peremptory challenges. Peremptory challenges are a set number of challenges given to both Crown and defence counsel during jury selection. These challenges may be used at their discretion to exclude a potential juror from the panel without providing a reason. In some cases, this has led to their discriminatory use to ensure a jury of a particular composition, an issue that was recently litigated before the Yukon Court of Appeal in *R v Cornell* (2017). The number of peremptory challenges currently allowed generally varies from 4 to 20 depending on the seriousness of the crime, the number of jurors, and whether there are co-accused.

Discrimination in the jury selection process in Canada has been well-documented. Retired Supreme Court Justice Frank Iacobucci discussed how peremptory challenges could be used in a discriminatory manner[61]. The Report recommended further consideration of this issue with a view to possible *Criminal Code* amendments to prevent the discriminatory use of peremptory challenges. Senator Murray Sinclair also documented the discriminatory use of peremptory challenges and recommended that they be abolished[62]. Similar calls for reform have been made by legal experts and advocacy groups, such as the Aboriginal Legal Services of Toronto[63].

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[61] *First Nations Representation on Ontario Juries - Report of the Independent Review Conduction by The Honourable Frank Iacobucci* (February 2013) – Last retrieved at: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html

[62] *Report on the Aboriginal Justice Inquiry of Manitoba – Public Inquiry into the Administration of Justice and Aboriginal People* (1991). A.C. Hamilton and M. Sinclair, commissioners.

[63] Purdy, C. The Canadian Press, *Experts renew call for challenge changes, jury lists with more Indigenous names* (February 9, 2018) – Last retrieved at: http://www.theguardian.pe.ca/news/experts-renew-call-for-challenge-changes-jury-lists-with-more-indigenous-names-184773/.

Bill C-75 proposes to abolish peremptory challenges. This approach is consistent with other common law countries laws, such as England, Scotland and Northern Ireland. Abolishing peremptory challenges would address the concern that this aspect of the jury selection process may be used to discriminate unfairly against potential jurors and would strengthen public confidence in the jury selection process. The proposed amendments signal that discrimination of any kind has no meaningful role in promoting fairness and impartiality in the criminal justice process.

Challenge for cause

The challenge for cause process is frequently used and is considered an important aspect of jury selection that aims to ensure only eligible and impartial jurors are selected to try a case. Currently, a challenge for cause (section 638 of the *Criminal Code*) occurs where Crown or defence counsel seek to exclude a potential juror on the basis of one or more of the following grounds:

- the name of the juror does not appear on the panel;
- the juror is biased;
- the juror has been convicted and sentenced to more than 12 months imprisonment;
- the juror is an "alien" (i.e., not a Canadian citizen);
- the juror is physically unable to perform the duties of a juror; and,
- the juror does not speak the official language of the trial.

With the exception of a person's name not appearing on the panel, which is determined by the trial judge, all other challenges for cause are currently decided by two lay persons called "triers", who are not trained in law. This process sometimes involves the same two triers or different "rotating" triers. The process has led to confusion and delays in jury trials across Canada. The proposed change would shift the responsibility to judges – who are trained and impartial adjudicators – to oversee the challenge for cause process in order to improve the efficiency and effectiveness of the process.

This change would implement a recommendation of the Steering Committee[64] , and would also bring Canada's challenge for cause process in line with that of other common law countries, such as England, New Zealand and Australia.

As well, Bill C-75 would amend the challenge for cause ground based on a juror's criminal record. Currently, jurors may be excluded for cause if they have been convicted of an offence and sentenced to more than 12 months imprisonment. The amendment would modify the period of imprisonment from 12 months to 2 years. This change would mean that fewer jurors with criminal records for minor offences could be excluded in the challenge for cause process, and is consistent with the Bill's proposed changes to increase the maximum penalty for summary conviction offences to 2 years less a day (rather

[64] Steering Committee on Justice Efficiencies and Access to the Justice System, *Report on Jury Reform* (May 2009),

than 6 months). The proposed change seeks to address concerns that have been raised that this rule disproportionately impacts certain segments of society, including Indigenous persons, as noted by Justice Iacobucci.

Other reforms to the challenge for cause grounds would be made to update and modernize outdated language (i.e., reference to a juror being an "alien" would be replaced with "non-citizen").

Other YCJA Amendments
(Clauses 379 to 381)

Several of the other YCJA amendments are proposed in a manner consistent with the Supreme Court's direction in *Jordan* to take "a fresh look at rules, procedures, and other areas of the criminal law to ensure that they are more conducive to timely justice and that the criminal process focuses on what is truly necessary to a fair trial".

Obligation to consider seeking adult sentence[65]

Bill C-75 would remove the obligation on prosecutors to consider seeking adult sentences for serious violent offences and the obligation to advise the court if they decide not to seek an adult sentence. These requirements create an unnecessary procedural obligation, given that prosecutors can be relied upon to consider seeking adult sentences in appropriate cases without the law specifically requiring them to do so. In addition, these requirements may inappropriately interfere with prosecutorial discretion.

Lifting publication bans on youth sentences

Bill C-75 would also repeal the provisions in the YCJA which require a youth justice court to decide, in every case where a young person receives a youth sentence for a violent offence, if the publication ban protecting that young person's identity should be lifted. This requirement has been in place since 2012 and while it has created additional burdens for the court, orders for the lifting of a publication ban under this provision have rarely, if ever, been made.

This provision is also at odds with a traditional cornerstone of youth justice in Canada which has generally protected the privacy of young persons involved in the youth criminal justice system. The rationale for this longstanding rule is that the publication of a young person's name would detrimentally affect the young person, impede rehabilitation efforts and in the long run, compromise public safety. Certain exceptions exist, such as when a youth receives an adult sentence.

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[65] This proposed amendment was the subject of a recommendation from the Uniform Law Conference of Canada (Resolution Number BC 2016-02).

Placement reports[66]

Finally, Bill C-75 would be amended to remove the obligation on the youth justice court to order a placement report in each instance where a young person receives an adult sentence. Instead, such reports would be ordered at the youth justice court's discretion, when it is of the view that such a report would be of assistance to the court in deciding on the placement of the young person. As it stands, the current obligation contributes to delay in many situations where the placement decision is readily apparent to all parties involved.

Other Amendments

Bill C-75 will also include the following amendments to ensure that the *Criminal Code* is closely aligned with the *Charter* and promote greater consistency and respect for the *Charter*, while at the same time, seek to address inefficiencies in the criminal justice system.

Victim surcharge (Bill C-28)

Bill C-75 incorporates the proposals included in Bill C-28, *An Act to amend the Criminal Code* (victim surcharge). These proposals aim to restore judicial discretion in imposing victim surcharges.[67]

Currently, the victim surcharge is imposed automatically on sentencing. The amendments would enable the Court to exempt an offender from the payment of a victim surcharge when the payment would cause the offender undue hardship. The amendments would also provide courts with guidance on what constitutes undue hardship. If Bill C-75 is passed, a victim surcharge would be paid for each offence, with an exception for certain administration of justice offences if the total amount of surcharges imposed on an offender would be disproportionate in the circumstances. Courts would be required to provide reasons for the exemption from the payment of a victim surcharge.

Forcing offenders to pay when they are truly incapable of doing so cannot be said to benefit victims as no money can be collected to pay the victim surcharge. Further, mandatory application of the federal victim surcharge to all offenders, even those who genuinely lacked the ability to pay, has resulted in a number of *Charter* challenges.

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[66] This proposed amendment was the subject of a recommendation from the Uniform Law Conference of Canada (Resolution Number MB 2013-01). Placement reports are prepared by corrections officials and are used to assist the court in determining where to house the offender. Such reports look at a number of factors, including, *inter alia*, the age of the offender, the length of sentence imposed, risk/safety to the offender and other inmates in the institution, and other needs of the offender such as available programming.

[67] The federal victim surcharge is an additional penalty imposed on an offender at the time of sentencing. It is designed to promote a sense of responsibility in offenders and an acknowledgement of the harm done to victims and the community. All federal victim surcharge money collected is used by the province or territory where the crime occurred to help fund their services to victims of crime.

The proposed amendments would address concerns related to the adverse impacts on Indigenous people and individuals from vulnerable populations that are overrepresented in the criminal justice system, without negatively impacting victims. The proposed amendments would also address efficiencies in the justice system as the offenders who truly are unable to pay would not need to seek from the court multiple extensions to pay the victim surcharge.

Exploitation and trafficking in persons (Bill C-38)

Bill C-75 also includes the proposals that are proposed by Bill C-38, *An Act to amend An Act to amend the Criminal Code* (exploitation and trafficking in persons). Bill C-38 would facilitate the bringing into force of amendments that would facilitate the prosecution of human trafficking offences under the *Criminal Code* as well as add the trafficking in persons offence to the list of offences to which a reverse onus applies in proceedings for the forfeiture of proceeds of crime.

Unconstitutional provisions (Bill C-39)

Lastly, Bill C-75 includes the proposals found in Bill C-39, *An Act to amend the Criminal Code* (unconstitutional provisions) *and to make consequential amendments to other Acts*. These proposals would amend the *Criminal Code* to, among other things:

- remove provisions that have been ruled unconstitutional by the Supreme Court of Canada;
- repeal section 159 of the *Criminal Code* and provide that no person shall be convicted of any historical offence of a sexual nature unless the act that constitutes the offence would constitute an offence under the *Criminal Code* if it were committed on the day on which the charge was laid; and,
- make consequential amendments to the *Corrections and Conditional Release Act* and the *Youth Criminal Justice Act*.

Coming into force

The amendments relating to bail and administration of justice offences, including amendments to *Youth Criminal Justice Act*, would come into force 180 days after Bill C-75 receives Royal Assent to provide additional time for implementation of these measures, including training for police and Crown prosecutors.

The amendments relating to reclassification, preliminary inquiries, judicial case management, *Youth Criminal Justice Act* (other than those relating to administration of justice offences) and all additional efficiency measures would come into force 90 days after the Bill receives Royal Assent.

The amendments relating to victim surcharge (former Bill C-28) would come into force 30 days after the Bill receives Royal Assent.

As was proposed in Bill C-38, the amendments relating to exploitation and trafficking in persons (former Bill C-452) would come into force upon Royal Assent of Bill C-75, with the exception of the amendment that would provide consecutive sentences for offences relating to trafficking in persons, which would come into force on a day fixed by order of the Governor in Council.

All proposed amendments in Bill C-39 that have been included in Bill C-75 would come into force on Royal Assent with one exception. The amendment to subsection 719(3.1) of the *Criminal Code*, removing the limits to credit for presentencing custody that were found unconstitutional, would come into force 180 days after Bill C-75 receives Royal Assent.

Annex A: Statistics and Research

Public Opinion Research

Justice Canada periodically commissions national surveys to understand Canadians' perceptions, understanding, and priorities on justice-related issues through its National Justice Survey (NJS). For the 2016 and 2017 iterations, the focus was on providing supporting information for the ongoing criminal justice system review, including the perceptions of values for and expectations of the criminal justice system.[68,69] Below findings from both surveys are presented.

Many respondents believed that dealing with criminal behaviour outside of the courts could have a positive impact on the criminal justice system, even in some cases where crimes are more serious.[70]

- 69% of those surveyed believe that diversion could make the criminal justice system more effective (e.g., holding people to account in an appropriate way; 18% said it would not);
- 79% of respondents believe that diversion could make the criminal justice system more efficient (e.g., reduce the caseload of courts and court processing time; 11% said it would not);
- Over forty percent (42%) of respondents thought diversion should be the preferred response for anyone accused of non-violent crime, unless specific elements of the case warrant more restrictive measures. A further 30% thought diversion should be used only for first time accused of non-violent crime. Just over one in 10 (13%) reported that diversion should be the preferred response for all accused;
- When presented with scenarios that depicted sexual assault involving a minor, recklessly discharging a firearm, selling opioids while carrying a concealed weapon, more than half (53% to 68%) of respondents would have preferred that the offenders had been diverted out of the court system to be held accountable for the crime in alternative ways (e.g., community service, mediation, referrals to specialized rehabilitative programs and/or victim-offender reconciliation programs) rather than staying in the system to be prosecuted. Of those who chose prosecution, most preferred a community-based resolution as opposed to incarceration.

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[68] The 2016 NJS included a representative sample of 4,200 Canadians 18+ from all provinces and territories for a first survey, 1,863 of these respondents completed a follow-up survey, and finally 6 focus groups and 3 online discussion groups. The 2017 NJS included two surveys with representative samples of Canadians 18+ (N=2,000 for each survey) as well as 12 focus groups and 20 interviews.

[69] EKOS Research Associates (2017). National Justice Survey: Canada's Criminal Justice System. Ottawa. (http://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/por-ef/justice_canada/2017/015-16-e/report.pdf – accessed on April 12, 2018). Results from the 2017 survey will be released in May 2018 and will be available from National Archives and the Justice Canada website.

[70] Source: NJS 2017.

Respondents strongly supported discretion in sentencing and saw the importance of considering personal circumstances, the circumstances of the offence, as well as family situations when determining sentences.[71]

- The overwhelming majority of respondents support judicial discretion in sentencing. Only 4% of respondents thought that judges should have no discretion in sentencing. However, more respondents supported a structured approach to discretion (71%) than full discretion (24%);
- In focus groups, respondents talked about the importance of considering seriousness of the crime, intent to harm, whether remorse was shown or responsibility was taken, previous history of offending, offender background and circumstances, and circumstances of the crime;
- More than two in three (69%) respondents said judges should give strong consideration[72] to whether an offender has mental illness or cognitive functioning problems in determining a sentence and seven in ten (71%) said that that it is very important that the criminal justice system consider the circumstances of vulnerable or marginalized persons.

Respondents supported the use of least restrictive measures, the use of community-based responses and reducing incarceration. Many felt that community-based responses could have a positive impact on the criminal justice system and crime reduction.[73]

- Over half of respondents (55%) agreed that too many people were incarcerated in Canada (17% disagreed and 18% neither agreed nor disagreed);
- 69% of respondents agreed that an offender should only be incarcerated if probation, community sentences, fines/other less restrictive measures are not appropriate;
- 63% agreed that incarceration should only be used for those committing serious crimes;
- The majority of respondents (90%) were at least moderately supportive of community-based sentences for offenders found guilty of non-violent crimes;
- When presented with three scenarios depicting various offences including sexual assault against a minor, discharging a firearm with recklessness, trafficking in opioids while in possession of a weapon, most (77%-86%)[74] believed that offenders should have been held accountable through community-based responses (including diversion), rather than jail/prison (10% -17%);
- Almost three quarters (73%) of respondents believed that a greater focus on community-based responses would reduce crime, only 10% believe that it would have a limited impact;
- Six in ten (61%) thought that community-based responses would result in lower levels of reoffending (15% said it would not)
- Two thirds of respondents (66%) thought that community-based responses to crime would result in greater efficiency in the justice system (13% said it would not), and 59% of respondents indicated

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[71] *Ibid.*

[72] For the 2016 data seven point scales were used. Strong consideration is defined as selecting 5, 6, or 7 on a seven point scale. Moderate consideration is defined as selecting 4, and low consideration is defined as selecting 1, 2, or 3.

[73] Source: NJS 2016 and NJS 2017.

[74] The range of percentages reflect responses to the three scenarios.

that community-based responses would increase their trust and confidence in the criminal justice system (18% said it would not).

Many respondents believed that greater use of community-based alternatives could help reduce overrepresentation of Indigenous offenders and those with mental health issues and cognitive functioning problems. [75]

- One-in-two respondents believed that greater use of community-based alternatives to prosecution would reduce the overrepresentation of those with mental health or cognitive functioning disabilities (50%), and would reduce the overrepresentation of Indigenous persons (55%);
- Three-in-four (75%) respondents agreed that there should be an increase in the number of accused remaining in the community.

*Those surveyed acknowledge that there is a problem with how breaches of conditions and failure to comply with orders (*e.g., *administration of justice offences (AOJOs)) are handled in the criminal justice system. Many felt that although there should be a response when conditions are not met, a criminal charge for failing to meet conditions is not the preferred response. Respondents were concerned about conditions that could put up barriers to accused/offenders ability to function in their communities, and highlighted the need to have supports in place for conditions that are imposed.*[76]

- Focus group participants acknowledged that there are challenges to those released on bail, probation, or parole on meeting the conditions set out in their release. A criminal charge for breach of conditions seemed unreasonable to many participants, particularly those actions that are not in itself a criminal offence (such as a curfew violation or arriving late to a court proceeding). However, it was acknowledged that there needs to be consequences for violating of conditions which could include warnings, review by a panel, assigning community service, changing conditions, etc.;
- Most focus group participants were particularly concerned about conditions that erect further barriers for offenders, and hamper rather than help them integrate into society. These included, for example, curfews for those who may find employment involving shift work or restrictions on computer access for those seeking employment;
- Most focus group participants expected that conditions set out in a release should be linked to some form of support, which could include, treatment for those with addiction issues who are ordered to not consume alcohol, or transit passes to those without transportation or employment and expected to attend parole meetings or court dates. Without support to meet conditions, the courts are "setting you up to fail";
- Over two-in-three (68%) agreed that breaches that do not involve a criminal act should be dealt with outside of the criminal justice system;
- 75% of respondents thought that response by criminal justice system professionals to persons failing to respect conditions should be determined based on taking individual circumstances into account

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[75] *Ibid.*
[76] Source: NJS 2017.

(19% thought all should receive the same response). The three most important circumstances were: 1) whether the breach was due to practical issues or unforeseen issues such as work schedules, lack of transportation, unavoidable delays or unexpected situations that arose (81%), 2) whether the accused/offender intentionally breached the condition (i.e., did not respect their order; 79%), and 3) whether addictions, mental health problems or cognitive functioning issues affected the accused/offender's ability to comply with the order (79%).

Bail

Despite limited national data on bail, some key findings and trends have been reported in a recent Justice Canada publication on bail[77]:

- Data from the Ontario Court of Justice showed that the proportion of criminal cases that began in bail court rose from 39% in 2001 to 46% in 2017;[78]
- A study conducted in eight Ontario courts from 2006 to 2008 showed that a significant number of bail decisions were routinely adjourned; on an average day bail decisions were delayed for between 57% and 81% of cases;[79]
- Similar results were found by another study conducted in five jurisdictions in 2013, where on average each day, about 54% of all cases observed were adjourned. This proportion varied by jurisdiction;[80]
- A more recent study (2017) found that in 497 appearances in six Canadian courts, 48% of bail hearings were adjourned;[81]
- A study based on court data collected from April to June 2011 showed that approximately half of cases in bail courts were subject to a release order (Quebec, 57%; Ontario, 51%; British Columbia, 47%); as well, the study showed that sureties were routinely required in Nova Scotia (81%), Ontario (69%) and Quebec (60%), while rarely being required in Alberta and British Columbia;[82]
- A study conducted in Southern Ontario bail courts found that almost all releases on bail (98%) involved conditions; on average, 6.2 conditions were imposed on accused released; the most

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[77] JustFacts. (2017). *JustFacts: Trends in Bail Court Across Canada.* Department of Justice Canada.

[78] Ontario Court Of Justice. (2017). *Bail Statistics (By Offence) Provincial Overview January 2017 to December 2017. Retrieved from* http://www.ontariocourts.ca/ocj/files/stats/bail/2017/2017-Bail-Offence.pdf

[79] A total of 4,085 cases were observed. Observations took place over 148 days between April 2006 and December 2008. Source: Myers, N.M. (2009). Shifting Risk: Bail and the Use of Sureties, *Current Issues in Criminal Justice,* 21(1): 127-147.

[80] A total of 718 bail cases were observed across five jurisdictions (BC, ON, NS, MB, YK) over 44 days between June and November 2013. Of these, 389 cases were released on bail. Source: Canadian Civil Liberty Association and Education Trust. (2014). *Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention.* Retrieved from https://ccla.org/cclanewsite/wp-content/uploads/2015/02/Set-up-to-fail-FINAL.pdf.

[81] Bail observation study (2017). Justice Canada. Unpublished report.

[82] This study only included bail decisions made at first phase of process (i.e., 5,311 cases from BC, 1,783 cases from Ontario, 2,190 cases from Quebec). Data collection methods varied across for each jurisdictions resulting in a number of limitations. Source: Steering Committee on Justice Efficiencies and Access to the Justice System. (October 27, 2015). *National Bail Survey and Data Collection Project.* Presentation retrieved on March 8, 2017.

common were residence requirement or weapons restrictions (77% each), no contact orders (75%) and abstaining from certain areas (60%);[83]

- Similarly an observation study of bail appearances in six Canadian courts found that 99% of accused released on bail were given conditions, with 92% having multiple conditions; on average 5 conditions were imposed; [84]
- A study conducted in five courts in four Canadian jurisdictions found that only 18% of accused released on bail violated the terms of their release. When it was violated, 98% were breaches of conditions or failure to attend court.[85]

Intimate Partner Violence

Recent data show the prevalence of intimate partner violence in Canada and highlights that the overwhelming majority of victims are women[86]:

- Between 2005/2006 and 2010/2011, intimate partner violence accounted for about six in ten (57%) completed adult criminal court cases resulting from violent criminal incidents reported by police.
- In 2016, over 93,000 people in Canada were victims of intimate partner violence, representing just under three in ten (28%) victims of police-reported violent crime. Four out of five victims of police-reported intimate partner violence were women (79%) - representing about 73,400 female victims.
- Victimization by an intimate partner was the most common form of police-reported violent crime committed against females (42% of female victims, compared to 12% of male victims).
- In 2016, violence within dating relationships was more common than violence within spousal relationships, according to police reported data. A current or former dating partner was the perpetrator against 55% of intimate partner violence victims, compared to a current or former legally married or common-law spouse (44% of victims).
- The type of violence most often experienced by police-reported intimate partner violence victims was physical force, such as pushing, hitting or choking (71%).
- In 2016, the rate of police-reported intimate partner sexual assaults was 11% higher than in 2015 and 25% higher than in 2011. The rate of intimate partner sexual assault in 2016 was 40 times higher among women than men.
- Of the 948 intimate partner homicides between 2006 and 2016, most were committed by a current or former legally married or common-law spouse (73%). Women continued to be at a higher risk of

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[83] Grech, D.C. (2016). *Bail Decision-Making in Common Law Jurisdictions: What can Canada learn from England and Wales* [Power Point slides]. Retrieved July 13, 2016.

[84] Bail observation study (2017). Justice Canada. Unpublished report.

[85] Beattie, K., Solecki, A. & Morton-Bourgon, K. E. (2013). Police and Judicial Detention and Release Characteristics: Data from the Justice Effectiveness Study. Department of Justice Canada.

[86] Burczycka, M. and S. Conroy (2018). Family violence in Canada: A statistical profile, 2016. Statistics Canada, Catalogue no. 85-002-X; Beaupré, P. (2015) Cases in adult criminal courts involving intimate partner violence. Statistics Canada, Catalogue no. 85-002-X; Boyce, J. (2016). Victimization of Aboriginal people in Canada, 2014. Statistics Canada, Catalogue no. 85-002-X.

intimate partner homicide, with a rate almost four times higher than that of men in 2015. Females aged 25 to 29 years were at the highest risk of intimate partner homicide.

- Based on findings from the 2014 General Social Survey on Victimization, Indigenous women (10%)[87] were about three times as likely to report being a victim of spousal violence as non-Indigenous women (3%).

Youth Criminal Justice Act (YCJA)

The *YCJA*, which came into force in 2003, has reduced the over-use of the formal court system and of custody for youth (65% reduction in youth custody). The *YCJA* contemplates alternatives to charging for less serious offences (such as AOJOs), including requiring police officers to consider using non-charge options or "extrajudicial measures" before deciding to charge a young person. The Act aims to reduce over-reliance on custody by reserving custodial sentences primarily for violent and serious repeat offenders. The *YCJA* also emphasizes the importance of timely intervention with youth, given that youths' perception of time is different than adults' and that the ability of a young person to appreciate the connection between offending behaviour and its consequences weakens the longer the proceedings take to complete.

Despite the *YCJA's* clear direction, cases in which an AOJO is the most serious offence are disproportionately dealt with through police charging, prosecution and custody sentences. AOJOs contribute to the overrepresentation of vulnerable young people, particularly Indigenous youth, in the youth justice system. The aim of the proposed *YCJA* amendments is to strengthen aspects of the current *YCJA* so that AOJOs will occur less frequently, will most often be dealt with through extrajudicial measures or by a judicial review process, and will be less likely to result in custody.

Participants at the March 2017 Justice Canada National Roundtable on Over-representation of Indigenous Youth emphasized that AOJOs needed to be addressed on a priority basis, suggesting that: too many conditions are imposed on youth and are often unrelated to the young person's offending behaviour; youth need to be better supported to comply with conditions; non-charge options, such as extrajudicial measures or sentence reviews, would be more appropriate responses to breaches of conditions in most cases; and the law should further limit discretion to impose custody in relation to AOJOs. Some participants questioned the social utility of having a breach offence and expressed support for non-criminalization of breaches.

Proposed *YCJA* amendments would also eliminate unnecessary burdens on courts and other inefficiencies by repealing *YCJA* provisions relating to mandatory hearings and lifting of the publication ban on youth who commit violent offences and obligations on the Crown when not seeking an adult sentence.

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[87] Statistics Canada advises to use this data with caution.

Preliminary Inquiries

Recent publications[88,89,90] have reported that:

- In 2014/2015, there were 9,179 completed adult criminal court cases (provincial and superior court cases) that had at least one charge with a preliminary inquiry requested and/or held;
- The majority (81%) of these cases were completed in less than 30 months;
- The number of preliminary inquiries scheduled and/or held for the most serious offence in adult and youth criminal court cases, has decreased 37% since 2005/06.

In April 2017, Justice Canada undertook an electronic survey on preliminary inquiries and collected information from 1,969 Crown prosecutors, judges, police, defense counsel, legal aid counsel and victim stakeholders.[91] Key results include:

- Respondents 'somewhat agree' or 'agree' that the preliminary inquiry:
  - Serves the rights of the accused (84%);
  - Fulfils its functions (71%) and its purpose (68%);
  - Serves the needs and values of the criminal justice system (57%);
  - Is necessary (51%);
  - Serves the needs of victims (39%).
- Eligible respondents indicated that they 'agree' or 'somewhat agree' with the following challenges
  - Negatively impact vulnerable witnesses, who are required to testify twice (69%);
  - Contributes to delays (65%);
  - Is used as a "fishing expedition" (64%);
  - Is of limited utility due to the Justice's limited jurisdiction (58%);
  - Requires disproportionate time and resources for the value-added (57%);
  - Is difficult for the judiciary to effectively control and manage (41%).
- Results indicate the continued polarization in relation to preliminary inquiry reform as illustrated by the divided proportions of respondents who believed the following reforms option would bring 'some improvement' vs. 'significant improvement' to the current regime:
  - Restrict preliminary inquiries to "serious offences" (49%);
  - Codify out-of-court examination mechanism (judge not present but available to rule (45%));
  - Restrict preliminary inquiries to case where certain factors warrant holding one (e.g., drug offences, volume of evidence, complex fraud cases, etc.) (40%);
  - Preliminary inquiry only on consent of the Crown and Defence (42%);
  - Restrict preliminary inquiries to offences carrying a maximum penalty of 14 years + (33%).

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[88] Maxwell, Ashley (2017). *Adult criminal court statistics in Canada, 2014/2015*. Statistics Canada, Catalogue no. 85-002-X.
[89] JustFacts. (2017). *JustFacts: Jordan: Statistics Related to Delay in the Criminal Justice system.* Department of Justice Canada. http://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/dec01.html (accessed April 18, 2018).
[90] JustFacts. (2017). *JustFacts: Preliminary Inquiries.* Research and Statistics Division, Department of Justice Canada. http://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/jun01.html (accessed August 22, 2017).
[91] Research and Statistics Division, Justice Canada (2017). Preliminary Inquiries: Stakeholder Survey Results (internal report).

Annex B: Government Response to the Standing Senate Committee on Legal and Constitutional Affair's Report "Delaying Justice Is Denying Justice"

Minister of Justice
and Attorney General of Canada

Ministre de la Justice
et procureur général du Canada

The Honourable / L'honorable Jody Wilson-Raybould, P.C., Q.C., M.P. / c.p., c.r., députée
Ottawa, Canada K1A 0H8

CLERK OF THE SENATE
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GREFFIER DU SENAT

NOV 15 2017

Chair
Standing Senate Committee on
Legal and Constitutional Affairs
The Senate of Canada
Ottawa ON K1A 0A4

Dear Sir/Madam:

On June 20, 2017, the Senate requested that the Government table a comprehensive response to the Nineteenth Report of the Standing Committee on Legal and Constitutional Affairs entitled *Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court delays in Canada (Final Report)*. I would like to thank the Committee for its comprehensive study of the factors contributing to delays and its recommendations to reduce such delays and address inefficiencies in Canada's criminal justice system. On behalf of the Government, and pursuant to Rule 12-24(3) of the Senate of Canada, I am pleased to provide the Government Response to the Committee's Final Report.

As the Committee has recognized, the criminal justice system is a shared responsibility in Canada and all levels of government have an important role to play in addressing delays. Provinces and territories (PTs) have taken, and continue to take, various steps to address delays within their jurisdictions and have been engaging with their prosecutors, their judiciary, court services and the defence bar to develop and implement new measures to address delays. For example, many appointed additional provincial court judges, hired more Crown prosecutors, increased funding for duty counsel, and increased the use of extra-judicial measures for less serious cases. The Government is committed to playing its part and recognizes the importance and necessity of working closely with PT partners. Indeed, during our April and September 2017 meetings, all federal, provincial and territorial (FPT) Ministers Responsible for Justice agreed on the need for urgent and bold reforms to reduce delays, including reforms in the following areas: (1) bail; (2) administration of justice offences; (3) preliminary inquiries; (4) reclassification of offences; and (5) mandatory minimum penalties. In addition, during our September 2017 meeting, we further agreed that legislative enhancements to judicial case management were needed to help address delays.

Many of these specific issues were considered by the Committee during its study and are the subject of specific recommendations. More broadly, the Final Report's fifty recommendations identify actions for addressing delays under five overarching themes: (1) Legislative Amendments; (2) Judiciary; (3) Programs and Funding; (4) Data and Research; and (5) Systems and Operational Improvements.

Canada

Many of these recommendations align with my multipronged and comprehensive federal strategy to reduce delays in the criminal justice system, including working with my colleagues on identifying best practices and innovative approaches, litigation strategies, programmatic measures, judicial appointments and legislative measures.

Legislative Amendments

The Committee's Final Report highlights the importance of law reform as one way to address delays. To this end, I have been working closely with my PT colleagues to identify ways to reform the criminal law to make our system more effective and efficient while at the same time maintaining public safety, addressing victims' needs and respecting the rights of the accused.

Further to the FPT Ministers meetings held in April and September 2017, I am committed to continuing to work with my PT colleagues on the above-noted six priority areas of reform for reducing delays.

More broadly, the Government recognizes the importance of ensuring that the criminal law remains fair, clear and accessible. That is why we have taken steps to modernize the *Criminal Code*, including through Bills C-39, *An Act to amend the Criminal Code (unconstitutional provisions) and to make consequential amendments to other Acts* and Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act,* which, amongst other things, seek to remove unconstitutional laws from the *Criminal Code*. Bill C-51 also seeks to clarify the law concerning sexual assault in order to help reduce potential misapplications. Such changes are expected to improve victims' experience but are also expected to reduce confusion amongst criminal justice system participants and thus contribute to a more efficient criminal justice system.

We will continue to examine ways, in collaboration with our PT partners, to improve the criminal law, consistent with the Committee's recommendations to review the *Criminal Code*. For example, as part of my ongoing review of the criminal justice system, I have held roundtable discussions in all jurisdictions, bringing together criminal law experts, academics and key criminal justice system stakeholders to discuss how to modernize and reform the *Criminal Code*. This work remains ongoing and the results of this broad-based engagement will continue to inform the Government as it seeks to introduce future changes to the law.

Judiciary

The Government understands that judicial vacancies can affect a court's effectiveness and that a full judicial complement is key to providing access to justice to Canadians. As part of our efforts at maintaining the efficiency of the justice system, the Government committed $55 million over five years, and $15.5 million per year thereafter, to create 28 new federally appointed judicial positions. Since October 2015, the Government has appointed 132 superior court judges to appellate and trial courts across the country (including both new and elevated judges). I will continue to work diligently to fill existing vacancies on the superior courts as quickly as possible.

I am confident that the reforms the Government introduced to the superior courts' judicial appointments process in October 2016 will reinforce public confidence in the judiciary while continuing to identify outstanding judicial candidates who reflect Canada's diversity and a gender balance.

Among the reforms are measures allowing for a more accurate picture of the official language capacity of candidates. Applicants are asked to identify their capacity to communicate in both official languages, and they may be assessed. I also remain committed to consulting with chief justices regarding the bilingual capacity needs of their respective courts. Finally, on September 25, 2017, I announced a seven-point Action Plan intended to enhance the bilingual capacity of the superior court judiciary. The measures include concrete steps to increase awareness regarding the linguistic rights of litigants, respond to recommendations made by the Commissioner of Official Languages, and ensure access to justice in both official languages.

The Committee's Final Report highlights the importance of judicial education. The Government is firmly committed to upholding and protecting the independence of the judiciary and recognizes that it is the judiciary itself that is responsible for judicial education. The National Judicial Institute (NJI) provides training to judges at arm's-length from the Government. The Canadian Judicial Council (CJC) is also mandated to promote efficiency and uniformity and to improve the quality of judicial services in superior courts. The Government provides funding to both the CJC and the NJI in support of various programs, including an announcement in Budget 2017 for $2.7 million over five years to the CJC, and $0.5 million per year thereafter, to support programming on judicial education, ethics, and conduct. In addition, the Government continues to support projects currently underway through the Justice Canada Partnership and Innovation Program and the training pillar of the Access to Justice in Both Official Languages Support Fund.

I welcome the Committee's suggestion that all governments work together and with the judiciary to create a standardized set of statistical measures that would facilitate the tracking of the capacity of current judicial complements to keep up with incoming caseloads. Such proactive reporting would supplement the work that already has been done at the federal level to improve its capacity to objectively assess requests for additional judges.

Programs and Funding

I appreciate the Committee's consideration of issues relating to victims, Indigenous overrepresentation, restorative justice, mental health and substance use, and legal aid. Some recommendations included in the Committee's Final Report could have a significant impact on FPT budgets in the area of justice but are of great concern to the Government and partners. I will continue to pursue, in partnership with my FPT partners, our efforts in addressing concerns and solutions relating to these issues.

Funding for victims of crime

Although PTs are principally responsible for the delivery of victim services, the Government provides funding to PTs to assist them in the delivery of victim services and to support projects related to the delivery of integrated services to victims (e.g., victims of human trafficking or victims of sexual violence). I welcome the Committee's recommendations relating to victims of

crime, and I will continue to collaborate with PTs on this important work, specifically to examine the possibility of expanding the availability of victims' integrated services and advocacy centres in their respective jurisdictions.

Indigenous overrepresentation
The Government, through Budget 2017, committed $65.2 million over five years, starting in 2017-18, and $10.9 million per year ongoing, to help reverse the trend of Indigenous overrepresentation in Canada's criminal justice system and help previously incarcerated Indigenous Peoples heal, rehabilitate and secure employment. Work is under way in my department, and that of my colleague, the Minister of Public Safety and Emergency Preparedness, to support community-based alternatives to incarceration and reintegration support for Indigenous offenders. In addition, the Government has committed, through Budget 2017, to fund the Indigenous Justice Program ($55.5 million over five years, starting in 2017-18, and $11.1 million per year ongoing) for community-based programs that use restorative justice approaches as an alternative to the mainstream justice and correctional systems.

Restorative justice
I welcome the Committee's recommendations on this important issue, and I am committed to increasing the use of restorative justice processes at all stages of the criminal justice system. Discussions and calls for action will continue with key stakeholders, including FPT partners, criminal justice system officials, Indigenous Peoples, and victim service workers. This fall, my officials will launch a directory of restorative justice programs, as well as a five-year research plan with other federal departments and agencies to address the gaps in empirical research. As well, I am pleased to note that Canada's 2016 Resolution to the United Nations Commission on Crime Prevention and Criminal Justice on Restorative Justice in Criminal Matters was ultimately adopted by the Economic and Social Council in July 2016. In support of these efforts, Canada will host a United Nations Experts Meeting on Restorative Justice in November 2017, following Canada's annual National Symposium on Restorative Justice.

Addressing mental health issues and substance use in the criminal justice system
The Government is delivering on its commitment to improve access to mental health services for Canadians. Budget 2017 confirmed an investment of $5 billion over ten years to support PTs in improving access to mental health services. In order to meet this commitment, my officials will commence bilateral discussions with PT counterparts to examine approaches that fall under our respective areas of responsibility. Health Canada's Substance Use and Addictions Program, under the Canadian Drugs and Substances Strategy, will continue to provide financial support to PTs, non-governmental organizations and key stakeholders to strengthen responses to drug and substance use issues in Canada. Public Safety Canada, through the National Crime Prevention Strategy and its work with the FPT Ministers National Action Plan on Crime Prevention, will also continue supporting programs and tools to help address these important issues. In addition, I continue to work with my colleague, the Minister of Health, on the Opioid Response Strategy and continue to support the Drug Treatment Court Funding Program.

Legal aid
I appreciate the Committee's consideration of this issue. My officials will also continue their ongoing work on reporting and monitoring legal aid funding, reviewing data collection, including legal representation data in criminal courts, and supporting PTs in implementing

innovations. As well, work to develop indicators to measure legal aid performance outcomes on a national basis, in collaboration with the FPT Working Group on Legal Aid, will continue. Research activities that will provide a better understanding of the legal aid needs of specific overrepresented populations will be undertaken, and discussions on current and future legal aid research will be pursued with our partners.

Data and Research

Having accurate, reliable and current data about the criminal justice system is critical to evaluating its effectiveness and to informing the development of laws, programs and policies. The Government believes that changes to the criminal justice system must be evidence-based and provide good value to Canadians. We know, for example, that crime rates continue to generally decrease and are at approximately the same level they were in 1969. Despite this general decrease, we also know that the criminal justice system is increasingly more costly and is not as efficient as it could be. The Government recognizes that Canadians should not have to pay more and get less from their criminal justice system.

In Canada, Statistics Canada is responsible for the development of statistical systems, and the Canadian Centre for Justice Statistics (CCJS) is responsible for the collection of core national data on the justice system. The CCJS organizes and carries out the work of the National Justice Statistics Initiative, and members include FPT officials, Statistics Canada and CCJS representatives, and a representative of the Canadian Association of Chiefs of Police. FPT officials are regularly consulted as part of the CCJS work, including survey redesign initiatives. As well, I am pleased to report that my officials are currently developing an annual State of the Criminal Justice System Report, which would establish targets and performance measures related to the criminal justice system.

Mental health data

The Government agrees that sufficient and reliable data, including data collection regarding mental health issues in the criminal justice system, is important. While the Mental Health Commission of Canada is not currently mandated to report on screening for mental health issues by the courts, screening for mental health issues by the courts is a shared jurisdiction between provincial/territorial and federal governments. Further examination on how to best respond to data needs in this area is warranted and will be undertaken in collaboration with PT officials.

Some data are available on mental health in the criminal justice system through the CCJS' Integrated Criminal Court Survey. There is, however, significant disparity in the way data are captured and stored by PTs as well as important data limitations. The Government is committed to working with key criminal justice system partners, including with the PTs, to pursue ways to promote consistency in data collection relating to the criminal justice system.

Systems and Operational Improvements

Ensuring the efficiency and effectiveness of the criminal justice system is a shared responsibility of the FPT governments. While I am committed to play a coordinating role in facilitating discussion amongst FPT Ministers of Justice, analyzing best practices, and ensuring that such input is considered in the collaborative work with the PTs, some of the Committee's

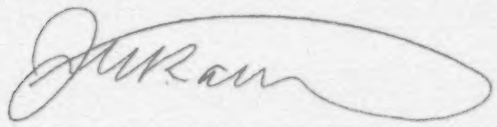
recommendations relating to measuring courthouse performance and efficiency, developing a software program for management and disclosure of evidence, and reviewing court scheduling practices, would fall under the responsibility of each PT.

The Government agrees that an important component of improving the efficiency of the criminal justice system is to look at ways to modernize its use of information technology in cooperation with the PTs. I will continue the dialogue with my officials and PT counterparts regarding better use of technology in the criminal justice system. I will examine ways in which existing programs, such as the Access to Justice Services Agreements in the Territories, could respond to some of the Committee's recommendations regarding information technology.

Conclusion

The Government is committed to ensuring that our criminal justice system contributes to public safety, shows compassion for victims, meets the needs of vulnerable persons and develops integrated approaches that respond to the causes and consequences of crime. To succeed, our system must be efficient and adapt to the changing realities of today's Canada. The Government will continue to work closely with our provincial and territorial partners and stakeholders to find ways to ensure a timely, effective, efficient and fair criminal justice system.

Respectfully,



The Honourable Jody Wilson-Raybould, P.C., Q.C., M.P.
Minister of Justice and Attorney General of Canada